(8) No. 98-369-CFX Title: National Aeronautics and Space Administration, etc., et al., Petitioners
v.
Federal Labor Relations Authority, et al.

Docketed:
August 31, 1998 Court: United States Court of Appeals for the Eleventh Circuit

Entry	Date	Proceedings and Orders
	Jun 19 1998	Application (A97-969) to extend the time to file a petition for a writ of certiorari from June 29, 1998 to July 29, 1998, submitted to Justice Kennedy.
	Jun 22 1998	Application (A97-969) granted by Justice Kennedy extending the time to file until July 29, 1998.
	Jul 17 1998	Application (A97-969) to extend further the time to file a petition for a writ of certiorari from July 29, 1998 to August 28, 1998, submitted to Justice Kennedy.
	Jul 24 1998	Application (A97-969) granted by Justice Kennedy extending the time to file until August 28, 1998.
	Aug 28 1998	Petition for writ of certiorari filed. (Response due September 30, 1998)
	Sep 11 1998	Waiver of right of respondent American Federation of Government Employees to respond filed.
	Sep 21 1998	Memorandum of respondent Federal Labor Relations Authority filed.
	Oct 7 1998	DISTRIBUTED. October 30, 1998
	Nov 2 1998	Petition GRANTED. SET FOR ARGUMENT March 23, 1999. **********
	Dec 3 1998	Motion of Solicitor General to dispense with printing the joint appendix filed.
	Dec 14 1998	Motion of Solicitor General to dispense with printing the joint appendix GRANTED.
	Dec 17 1998	Brief of petitioners NASA, et al. filed.
	Jan 5 1999	Order extending time to file brief of respondent on the merits until January 26, 1999.
	Jan 26 1999	Brief of respondent Federal Labor Relations Authority in opposition filed.
	Jan 26 1999	Brief of respondent American Federation of Government Employees filed.
	Jan 26 1999	Brief amicus curiae of National Treasury Employees Union filed.
	Feb 5 1999	Motion of respondent American Federation of Government Employees for divided argument filed.
	Feb 11 1999	CIRCULATED.
	Feb 24 1999	Application (A98-707) to extend the time to file a reply brief from February 25, 1999 to March 4, 1999 by the Solicitor General, submitted to Justice Kennedy.
	Feb 24 1999	Application (A98-707) granted by Justice Kennedy extending the time to file until March 4, 1999.
	Mar 1 1999	Motion of respondent American Federation of Government Employees for divided argument GRANTED. and the time is divided as follows: 20 minutes for the Federal Labor Relations Authority and 10 minutes for the American

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No. 98-369-CFX

Entry	Date	Proceedings and Orders
		Federation of Government Employees, AFL-CIO.
	Mar 2 1999	Record filed.
	Mar 3 1999	Reply brief of petitioner National Aeronautics and Space Administration, et al. filed.
	Mar 9 1999	Record filed.
	Mar 23 1999	ARGUED.

No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION WASHINGTON, D.C., AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION OFFICE OF THE INSPECTOR GENERAL, PETITIONERSS

v.

FEDERAL LABOR RELATIONS AUTHORITY AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Service Labor Management Relations Statute, 5 U.S.C. 7114(a)(2)(B) gives a federal employee the right to the participation of a union representative at an interview by a "representative of the agency" when the employee reasonably believes the interview may result in disciplinary action. The questions presented are:

1. Whether an investigator from the Office of Inspector General (OIG) is a "representative of the agency" within the meaning of that provision, notwithstanding the provisions of the Inspector General Act, 5 U.S.C. App. 3, § 1 *et seq.*, that insulate the OIG from agency control.

2. Whether, if OIG interviews are governed by 5 U.S.C. 7114(a)(2)(B), an agency headquarters commits an unfair labor practice by failing to require the OIG to comply with 5 U.S.C. 7114(a)(2)(B), notwithstanding the fact that the Inspector General Act deprives an agency head of authority to direct or control the investigations of the OIG.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the National Aeronautics and Space Administration, Washington, D.C. (NASA Headquarters), and the National Aeronautics and Space Administration Office of the Inspector General (NASA-OIG), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 120 F.3d 1208. The decision and order (App., *infra*, 21a-57a) of the Federal Labor Relations Authority (Authority or FLRA) is reported at 50 FLRA 601.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1997. App., *infra*, 2a. A petition for rehearing was denied on March 31, 1998. *Id.* at 76a. On June 22, 1998, Justice Kennedy extended the time for filing a petition for a writ of certiorari to July 29, 1998, and on July 24, 1998, further extended the time for filing to August 28, 1998. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7114(a)(2)(B) of the Federal Service Labor-Management Relations Statute (FSLMRS), enacted as Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*, in pertinent part, provides:

> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at —
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> * * * * *
>
> (B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if —
>
> (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
>
> (ii) the employee requests representation.

Section 2 of the Inspector General Act of 1978 (Inspector General Act), Pub. L. No. 95-452, 92 Stat. 1101, 5 U.S.C. App. 3 § 2, in pertinent part, provides:

> In order to create independent and objective units —
>
> * * * * *
>
> there is hereby established in each of such establishments [listed in section 11(2)] an office of Inspector General.

Section 3 of the Inspector General Act, 5 U.S.C. App. 3 § 3, in pertinent part, provides:

> (a) There shall be at the head of each Office an Inspector General who shall be appointed by the President, by and with the advice and consent of the Senate, without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations. Each Inspector General shall report to and be under the general supervision of the head of the establishment involved or, to the extent such authority is delegated, the officer next in rank below such head, but shall not report to, or be subject to supervision by, any other officer of such establishment. Neither the head of the establishment nor the officer next in rank below such head shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any sub-p[o]ena during the course of any audit or investigation.
>
> (b) An Inspector General may be removed from office by the President. The President shall

communicate the reasons for any such removal to both Houses of Congress.

* * * * *

Section 9 of the Inspector General Act, 5 U.S.C. App. 3 § 9(a)(1) and (2), in pertinent part, provides:

(a) There shall be transferred —

(1) to the Office of Inspector General —

* * * * *

(2) such other offices or agencies, or functions, powers, or duties thereof, as the head of the establishment involved may determine are properly related to the functions of the Office and would, if so transferred, further the purposes of this Act,

except that there shall not be transferred to an Inspector General under paragraph (2) program operating responsibilities.

STATEMENT

1. This unfair labor practice decision arose out of the investigation of an employee of the National Aeronautics and Space Administration George C. Marshall Space Flight Center (Marshall Center) in Huntsville, Alabama. The material facts are not disputed. See App., *infra*, 23a-25a, 59a-63a.

a. In January 1993, NASA-OIG received information from the Federal Bureau of Investigation (FBI) that an employee at the Marshall Center, "P," was suspected of authoring various incendiary documents. App., *infra*, 60a. (To preserve his confidentiality, the name of the

employee was referred to as "P" in the administrative decisions below. See *id.* at 60a n.1.) The documents had such titles as "Payback List," "Revenge Tactics," "Retribution List," "Goals 1990," and "Goals 1991"; the latter two described aims to seek revenge on enemies within the Marshall Center. See C.A. R.E. 20-22, 43; see also App., *infra*, 60a. The documents named Marshall Center employees as potential targets for retribution and contained specific means and methods to get revenge, such as carbon monoxide poisoning, exploding natural gas under a house, making bombs, and injecting enemies with AIDS-infected blood. C.A. R.E. 20-21. Several documents had P's name on them, and a confidential source had identified P as their author. See *id.* at 21, 44-45. Investigators also received allegations that P had conducted surveillance of the homes of other employees. *Id.* at 43.

b. Upon obtaining that information from the FBI, NASA-OIG assigned the case a high priority and began investigating immediately. App., *infra*, 23a-24a, 60a-61a; C.A. R.E. 21, 42-44. NASA-OIG investigator Larry Dill sought to interview P as soon as possible and contacted him for that purpose. *Ibid.* P stated that he wanted both legal and union representation at the interview, and Dill acceded to both requests. App., *infra*, 23a-24a, 61a. Patrick Tays attended the interview as a representative of P's Union, Local 3434 of the American Federation of Government Employees (Local 3434 or Union). App., *infra*, 3a, 24a, 61a. At the interview in the office of P's attorney, Dill began by reading prepared "ground rules," which included the following: "The union representative, if present, serves as a witness and is not to interrupt the question and answer process. Additionally, the union representative is subject to being called as a witness for the govern-

ment." *Id.* at 24a, 61a. The union representative, Patrick Tays, objected to that "ground rule," after which Dill read the statement a second time and stated that he would move the interview somewhere else if Tays did not "maintain himself." *Id.* at 24a, 61a-62a. During the interview, Dill did not initially respond to Tays' request to see a particular document, although apparently Tays was able to see that document (and others) by standing behind P and his attorney. *Id.* at 24a-25a, 61a-62a. Tays later testified that P was affected by Dill's manner toward him (Tays) and that P only paid attention to his attorney and Dill and ignored Tays. *Id.* at 24a-25a, 63a. P was ultimately fired, and his current whereabouts are unknown to petitioners or (apparently) to the Union. *Id.* at 63a.

c. The Union filed charges with the FLRA, pursuant to 5 U.S.C. 7116(a)(1), alleging that NASA-OIG and NASA Headquarters had committed an unfair labor practice.[1] In particular, the Union charged that NASA-OIG and NASA Headquarters had violated 5 U.S.C. 7114(a)(2)(B), known as the "*Weingarten*" rule, which gives a federal employee in a bargaining unit the right to the participation of a union representative at an

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[1] Section 7116(a) provides, in pertinent part:

> For the purpose of this chapter, it shall be an unfair labor practice for an agency —
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> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
>
> * * * * *
>
> (8) to otherwise fail or refuse to comply with any provision of this chapter.

5 U.S.C. 7116(a)(1) and (8).

interview by a "representative of the agency" when the employee reasonably believes the interview may result in disciplinary action.[2] The complaint alleged that petitioners violated the rule by refusing to allow the union representative to participate actively in the investigatory interview of P. App., *infra*, 22a, 59a. The FLRA General Counsel issued a complaint containing that charge, pursuant to 5 U.S.C. 7118(a).

The OIG responded that it had acted reasonably in light of the "delicate situation" involving the safety of Marshall Center employees and that it had not interfered with Tays' rights to participate fully as a union representative. App., *infra*, 63a. The Administrative Law Judge (ALJ) concluded that the OIG investigator was a "representative of the agency" for purposes of 5 U.S.C. 7114(a)(2)(B), that the union representative was entitled to participate actively in the interview of P, and that the OIG investigator's actions had interfered with the representative's ability to do so. App., *infra*, 64a-71a. The ALJ recommended that the Authority order NASA-OIG to cease and desist from interfering with *Weingarten* rights and to post at all NASA locations a notice that the NASA-OIG will not interfere with those rights. *Id.* at 71a-73a. Finding no evidence that NASA Headquarters "was responsible for this violation," the ALJ recommended dismissal of the charges against NASA Headquarters. *Id.* at 71a.

NASA-OIG appealed the decision to the Authority, arguing principally that its investigator was not "a representative of the agency" under the D.C. Circuit's

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[2] The provision is known as the *Weingarten* rule because it extends to federal employees the rights established for private-sector employees in *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975).

decision in *United States Dep't of Justice* v. *FLRA*, 39 F.3d 361 (D.C. Cir. 1994) (*DOJ*). C.A. R.E. 71-80. The FLRA's General Counsel defended the ALJ's ruling against NASA-OIG, and did not take exception to the ALJ's ruling in favor of NASA Headquarters. See App., *infra*, 27a-28a; C.A. R.E. 84-102. On July 28, 1995, the Authority affirmed the ALJ finding of an unfair labor practice, concluding that Dill's announcement of the "ground rules" violated the statute and that, in conducting the interview, Dill was acting as a "representative" of NASA for *Weingarten* purposes. App., *infra*, 28a-48a. In reaching that conclusion, the Authority rejected the D.C. Circuit's contrary analysis in *DOJ* and adopted instead the approach set forth in the Third Circuit's earlier decision in *Defense Criminal Investigative Service* v. *FLRA*, 855 F.2d 93 (3d Cir. 1988) (*DCIS*). See App., *infra*, 37a-40a. In addition, the Authority reversed the ALJ's ruling with respect to NASA Headquarters, holding that agency headquarters must be held responsible for the actions of NASA-OIG to effectuate the purposes of the statute, even though the FLRA General Counsel had not filed any exceptions to the ALJ's ruling that NASA Headquarters was not responsible for the conduct at issue. *Id.* at 48a-52a. The Authority, therefore, ordered NASA Headquarters and NASA-OIG to cease and desist from restricting the participation of union representatives in interviews conducted by NASA-OIG. *Id.* at 52a-53a. The Authority further ordered NASA Headquarters to order NASA-OIG to comply with the requirements of 5 U.S.C. 7114(a)(2)(B) and to post appropriate notices at the Marshall Center. *Id.* at 53a-55a.

2. The Authority immediately filed an application for enforcement in the Eleventh Circuit. C.A. R.E. 130, 132, 133. Four days after the FLRA's petition was docketed in that court, NASA-OIG and NASA Headquarters filed a petition for review in the D.C. Circuit. C.A. R.E. 134. Both petitions were filed pursuant to 5 U.S.C. 7123(a), which provides that judicial review of the FLRA's decision or an action for enforcement by the Authority may be filed "in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia." 5 U.S.C. 7123(a). Pursuant to 28 U.S.C. 2112(a) and Multidistrict Lit. Panel R. 24, a panel randomly chose the Eleventh Circuit to hear the case.

The Eleventh Circuit granted the Authority's application for enforcement and denied the petition for review filed by NASA Headquarters and NASA-OIG. App., *infra*, 20a.[3] The court deferred to the Authority's interpretation of "representative of the agency" in 5 U.S.C. 7114(a)(2)(B), finding no evidence in the Inspector General Act that Congress sought to exempt the OIG from the *Weingarten* rule. In so ruling, the court of appeals adopted the analysis of the Third Circuit in *DCIS*, *supra*, and specifically rejected the contrary decision of the D.C. Circuit in *DOJ*, *supra*. App., *infra*, 7a-9a, 12a, 15a. The court thus found NASA-OIG guilty of an unfair labor practice in failing to accord the employee his *Weingarten* rights. The court also found NASA Headquarters guilty of an unfair labor practice on the theory that it has a supervisory role over the OIG and, therefore, has a duty to ensure that the OIG complies with the *Weingarten* rule.

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[3] The court of appeals also granted intervenor status to respondent American Federation of Government Employees, AFL-CIO. See App., *infra*, 4a.

The court denied rehearing on March 31, 1998. *Id.* at 76a.

REASONS FOR GRANTING THE PETITION

This case presents the question whether an Office of Inspector General (OIG) investigator is a "representative of the agency" for purposes of the *Weingarten* rule, 5 U.S.C. 7114(a)(2)(B). That issue has broad practical implications for the manner in which the federal government investigates allegations of wrongdoing by federal employees; the issue affects thousands of cases and tens of thousands of interviews each year. Resolving that issue requires a reconciliation of two statutes —the Federal Service Labor-Management Relations Statute (FSLMRS), 5 U.S.C. 7101 *et seq.*, and the Inspector General Act, 5 U.S.C. App. 3, § 1 *et seq.*— which were enacted on consecutive days in 1978 without any apparent consideration of the tension between them. Four circuits have addressed the issue presented here and have reached three different conclusions. This Court's review is warranted to resolve the conflict.

If, contrary to our submission, an OIG commits an unfair labor practice by restricting an employee's statutory *Weingarten* rights, the case also presents the question whether an agency headquarters is liable for an unfair labor practice for failing to direct the OIG to comply with 5 U.S.C. 7114(a)(2)(B). That issue also has broad implications for the independence of OIGs and the extent to which agencies may be held liable for actions over which management has no control. The decision below cannot be reconciled with the reasoning in *United States Nuclear Regulatory Commission* v. *FLRA*, 25 F.3d 229 (4th Cir. 1994) (*NRC*).

1. a. The better reading of the *Weingarten* provision in the FSLMRS, in conjunction with the Inspector

General Act, is that the OIG does not commit an unfair labor practice when OIG investigators restrict the participation of union representatives in OIG investigative interviews of federal employees. The court of appeals' ruling to the contrary is incorrect.

The FSLMRS establishes the scope and limits of federal sector collective bargaining. Section 7114, entitled "Representation rights and duties," provides that "[a]n exclusive representative of an appropriate unit * * * shall be given the opportunity to be represented at * * * any examination of an employee in the unit by a *representative of the agency* in connection with an investigation if * * * (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and (ii) the employee requests representation." 5 U.S.C. 7114(a)(2)(B) (emphasis added).

The court of appeals upheld the FLRA's view that "representative of the agency" in Section 7114(a)(2)(B) means any official within an agency and thus includes the OIG.[4] That position, however, is inconsistent with the rationale for this Court's recognition of the right to union representation at investigative interviews in *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975). In *Weingarten*, this Court emphasized that the representational right grows out of the collective bargaining relationship between the union and management. *Id.* at 260-261, 262. The Court determined that the rights enumerated in *Weingarten* arise out of the need to balance the power between the parties to the collective bargaining relationship:

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[4] The FSLMRS defines "agency" to mean "an Executive agency * * *," see 5 U.S.C. 7103(a)(3), but that definition does not resolve the meaning of the phrase "representative of the agency."

> The union representative whose participation [the employee] seeks is, however, safeguarding not only the particular employee's interest, but also the interests of the entire *bargaining unit* by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. The representative's presence is an assurance to other employees in the *bargaining unit* that they, too, can obtain his aid and protection if called upon to attend a like interview.
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> * * * * *
>
> Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided "to redress the perceived imbalance of economic power between labor and management."

Ibid. (footnotes omitted) (emphasis added). The phrase "representative of the agency" in 5 U.S.C. 7114(a)(2)(B), therefore, must be understood within the context of federal sector collective bargaining to encompass only a representative of the agency or agency component that engages in collective bargaining with the union at issue, which the OIG does not.

The Inspector General Act reinforces the conclusion that the OIG and its agents are not representatives of agency management. No other component of an agency has the independence conferred by statute upon the OIG, which operates independently of the direct supervision and influence of agency heads and outside the programmatic spheres of agencies. See *NRC*, 25 F.3d

at 232-236; see also *DOJ*, 39 F.3d at 366-367 (quoting *NRC*, 25 F.3d at 233-234).

That independence is codified in numerous ways. In particular, the NASA-OIG has a grant of statutory authority entirely different from and independent of the head of NASA. Compare 42 U.S.C. 2472 (creating NASA) with 5 U.S.C. App. 3 § 9(a)(1)(P) (creating NASA-OIG).[5]

More generally, the Inspector General Act provides that the OIG for each department shall be an "independent and objective unit[]," 5 U.S.C. App. 3 § 2, "appointed by the President" with "the advice and consent of the Senate, without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations," 5 U.S.C. App. 3 § 3(a). Each OIG must submit semi-annual reports to the agency head on the results of its investigations, and the agency head in turn must submit those reports to Congress within thirty days; even though an agency head may add comments on a report, the agency head cannot prevent the report from going to Congress or change its contents. 5 U.S.C. App. 3 § 5(b)(1). The same is true for reports of

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[5] That differentiation is common among agencies and their OIGs. Compare, *e.g.*, 7 U.S.C. 2201 (creating Department of Agriculture) with 5 U.S.C. App. 3 § 9(a)(1)(A) (creating Agriculture OIG); 20 U.S.C. 3411 (creating Department of Education) with 5 U.S.C. App. 3 § 9(a)(1)(D) (creating Education OIG); 29 U.S.C. 551 (creating Department of Labor) with 5 U.S.C. App. 3 § 9(a)(1)(J) (creating Labor OIG); 42 U.S.C. 3532 (creating Department of Housing and Urban Development (HUD)) with 5 U.S.C. App. 3 § 9(a)(1)(G) (creating HUD OIG); 42 U.S.C. 7131 (creating Department of Energy) with 5 U.S.C. App. 3 § 9(a)(1)(E) (creating Energy OIG).

"particularly serious or flagrant problems, abuses, or deficiencies" in programs, which must be reported by the OIG to the agency head and in turn transmitted by the agency head to the appropriate committee or subcommittee of Congress within seven days, along with a report prepared by the agency if the agency head deems one appropriate. 5 U.S.C. App. 3 § 5(d). An OIG is required to "report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law," 5 U.S.C. App. 3 § 4(d), and is to do so "directly, without notice to other agency officials," *NRC*, 25 F.3d at 234.

Moreover, although the OIG "report[s] to and [is] under the *general* supervision of the head [of the agency]," 5 U.S.C. App. 3 § 3(a) (emphasis added), only the President, not the agency head, may remove an Inspector General, 5 U.S.C. App. 3 § 3(b). Absent a specific statutory provision pertaining to a particular OIG, neither the agency head nor the deputy may "prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation." 5 U.S.C. App. 3 § 3(a). Indeed, other than the "general supervision" of the agency head and one deputy, the Inspectors General "shall not report to, or be subject to supervision by, any other officer of such [agency]." 5 U.S.C. App. 3 § 3(a). Thus, "no one else in the agency may provide any supervision to Inspectors General." *NRC*, 25 F.3d at 234.

Accordingly, an OIG is entirely "shielded with independence from agency interference" in the conduct of its work, *NRC*, 25 F.3d at 234, which spans a broad spectrum of responsibilities and powers: to conduct audits and investigations of the agency as the OIG deems "necessary or desirable," 5 U.S.C. App. 3 § 6(a)(2); to

have unfettered access to agency documents and personnel, 5 U.S.C. App. 3 § 6(a)(1) and (3); to issue subpoenas and administer oaths, 5 U.S.C. App. 3 § 6(a)(4) and (5); and to "receive and investigate complaints or information from an[y] employee of the [agency] concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety," 5 U.S.C. App. 3 § 7(a). OIGs conduct the full range of criminal and administrative investigations. 5 U.S.C. App. 3 § 4.[6] Because of the statutory separation of the OIG from the collective bargaining unit and the independence conferred on the OIG by statute, therefore, the OIG is not subject to 5 U.S.C. 7114(a)(2), which governs the relationship between labor and management. Accordingly, an OIG should not be charged with an unfair labor practice when it restricts the participation of a union representative in an investigative interview.

In construing the FSLMRS and the Inspector General Act to reach a contrary result, the court below erroneously focused on the effect of an interview on the employee rather than on the statutory separation of the

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[6] See, *e.g.*, *New Eng. Apple Council* v. *Donovan*, 725 F.2d 139, 143 (1st Cir. 1984) ("functions of OIG investigators are not so different from the functions of FBI agents"—both "investigate federal crimes, serve in undercover capacities, perform surveillance, and conduct investigatory interviews"); *Burlington N. R.R.* v. *OIG, R.R. Retirement Bd.*, 983 F.2d 631, 634 (5th Cir. 1993) (legislative history shows purpose of Inspector General Act "to consolidate existing auditing and investigative resources to more effectively combat fraud, abuse, waste and mismanagement in the programs and operations of [various executive] departments and agencies") (quotation omitted).

OIG from the agency it is charged with investigating. The court of appeals opined that "[t]he Statute [5 U.S.C. 7114(a)(2)(B)], like the *Weingarten* rule itself, focuses on the risk of adverse employment action to the employee. Because this risk does not disappear or diminish significantly when an investigator is employed in an agency component that has no collective bargaining relationship with the employee's union, we see no reason why the protection afforded by Congress should be eliminated in such situations." App., *infra*, 10a-11a (citing *DCIS*, 855 F.2d at 99). That analysis is incorrect. As the D.C. Circuit recognized, an employee can reasonably fear that disciplinary action may follow an interview conducted by an FBI agent or any number of other federal law enforcement agents, for example, yet it would not ordinarily be thought that the *Weingarten* statute requires the participation of a union representative at such an interview. *DOJ*, 39 F.3d at 366.

b. The four circuits to consider this issue have reached three different results and expressly acknowledged the circuit conflict. The Third Circuit has ruled that an OIG investigator is a "representative of the agency" and must therefore comply with the *Weingarten* rule in OIG investigations, *DCIS*, 855 F.2d 93, a result followed by the Eleventh Circuit below.[7]

The D.C. Circuit reached precisely the opposite conclusion in *DOJ*, 39 F.3d 361, creating a conflict that it acknowledged (*id.* at 366-67), as did the court below

[7] The Eleventh Circuit has reserved the question whether the rule applies to interviews conducted in the course of a criminal investigation, see App., *infra*, 11a n.6., while the Third Circuit has held that the rule applies to all OIG interviews, whether criminal or administrative in nature. See *DCIS*, 855 F.2d at 100.

(App., *infra*, 7a-8a). The D.C. Circuit concluded that an OIG investigator is not bound by the *Weingarten* rule for several reasons: first, the effort to characterize the OIG investigator as a "representative of the agency" within the meaning of Section 7114(a)(2)(B) "encounters considerable semantic difficulty," *id.* at 365; second, applying the rule to OIG investigators "clashes with the Inspector General Act of 1978," *id.* at 366; and third, because the rule is "[r]ooted * * * in labor-management relations," which are not relevant to the activities of the OIG. *Id.* at 368.

The "semantic" problem identified by the D.C. Circuit arises from the fact that the *Weingarten* rule is triggered when "a representative of the agency" questions an employee. When an OIG investigator does the questioning, there is no suitable "agency" to which the statutory term could refer. The agency that directly employs the person under investigation cannot qualify, because the OIG investigator is not a representative of that agency; the employing agency "c[an] not direct the investigator, and it ha[s] no control over him." 39 F.3d at 365. And the OIG itself, which does control the investigator, cannot be the agency mentioned in the statute because the "agency" in that phrase must be an entity that contains the employee's bargaining unit.[8] The OIG does not in fact contain the bargaining unit to which the employee under investiga-

[8] Because Section 7114(a)(2) provides for participation by "an exclusive representative of an appropriate *unit in an agency*" (emphasis added)—*i.e.*, a labor union, see 5 U.S.C. 7114(a)(1)—at "any examination of an employee in the unit by a representative of *the agency*," 5 U.S.C. 7114(a)(2)(B) (emphasis added), the court reasoned that the agency represented by the investigator must contain the bargaining unit of the investigated employee. 39 F.3d at 365-66.

tion belongs, *id.* at 365-66, nor could it do so, because the FSLMRS, 5 U.S.C. 7112(b)(7), expressly "forbids the formation of bargaining units containing employees primarily engaged in investigating other agency employees to ensure they are acting honestly—an apt description of investigators working for the Inspector General." 39 F.3d at 366 n.5 (citing *NRC*, 25 F.3d at 235).

The D.C. Circuit also found the independence conferred on the OIG by the Inspector General Act inconsistent with the view that an OIG investigator is a "representative of the agency" for purposes of the *Weingarten* rule. See 39 F.3d at 366-367. For that point the D.C. Circuit drew heavily on the analysis of the Fourth Circuit in *NRC*, 25 F.3d at 235. In *NRC*, the Authority had ruled that agency management was compelled to bargain over four proposals intended to bind OIGs in the conduct of their investigations. The Fourth Circuit rejected that determination because it would interfere with and undercut the independence of the OIG. See generally 25 F.3d at 233-236. So too here, the D.C. Circuit concluded that "[g]iven these provisions [of the Inspector General Act], none of which the Authority or the Third Circuit in *Defense Criminal Investigative Services* mentioned, there cannot be the slightest doubt that Congress gave the Inspector General the independent authority to decide 'when and how' to investigate (*United States Nuclear Regulatory Comm'n*, 25 F.3d at 234)" and "that the Inspector General's independence and authority would necessarily be compromised if another agency of the government—the Federal Labor Relations Authority—influenced the Inspector General's performance of his duties on the basis of its view of what constitutes an unfair labor practice." 39 F.3d at 367. The D.C. Circuit thus rejected the Third Circuit's decision in *DCIS* in large part because the Third Circuit (and the Authority) had failed to consider or analyze the relevant provisions of the Inspector General Act. See *ibid.*

Finally, the D.C. Circuit noted that the *Weingarten* rule was intended to "ameliorate the inequality of bargaining power between an employee going it alone and his employer," 39 F.3d at 368, but found that "[t]hese considerations do not apply to examinations of employees under oath in the course of an Inspector General's investigation" because the OIG's independence means that "the Inspector General cannot side with management, or the union." *Ibid.*

The Second Circuit recently adopted a third approach, concluding that the applicability of *Weingarten* rights turns on the nature of the investigation being conducted by the OIG. *FLRA* v. *United States Dep't of Justice*, 137 F.3d 683 (2d Cir. 1997) (*FLRA* v. *DOJ*). The Second Circuit did "not agree with the Third and Eleventh Circuits that section 7114(a)(2)(B) applies to questioning by an OIG agent simply because the inquiry concerns 'possible misconduct' of employees 'in connection with their work,' *DCIS/FLRA*, 855 F.2d at 100, or because the information obtained might be used to 'support administrative or disciplinary actions,' *NASA/FLRA*, 120 F.3d at 1213." 137 F.3d at 691. Rather, the Second Circuit held that the OIG cannot be considered a "representative of the agency" for purposes of the *Weingarten* rule so long as an OIG's investigation involves matters within the scope of bona fide functions of the Inspector General Act. 137 F.3d at 690-691. The court based that conclusion on the view that "Congress would [not] have wanted the *Weingarten* protection of the [FLMRS] to be circumvented by a request from an agency head to have an OIG agent

conduct an interrogation of the sort normally handled by agency personnel, an interrogation beyond the scope of OIG functions." *Id.* at 690. Thus, "[s]o long as the OIG agent is questioning an employee for bona fide purposes within the authority of the [Inspector General Act] and not merely accommodating the agency by conducting interrogation of the sort traditionally performed by agency supervisory staff in the course of carrying out their personnel responsibilities, the OIG agent is not a 'representative' of the employee's agency for purposes of section 7114(a)(2)(B)." *Id.* at 690-691. The Second Circuit's general rule, therefore, is similar to that of the D.C. Circuit, but contains an important qualification: if the OIG acts beyond its statutory mandate, it may be required to comply with the *Weingarten* rule. *Id.* at 691. Thus, although the Second Circuit cautioned that OIG investigators "disregard the *Weingarten* protections at their peril," it also minimized that concern: "In view of the broad scope of [Inspector General Act] functions, however, the risk that questioning by an OIG agent without the presence of a union representative would violate section 7114(a)(2)(B) seems remote." *Ibid.*

c. The federal government has a strong interest in determining whether OIG investigators must comply with the *Weingarten* rule, because the rule severely impairs the ability of OIGs to discharge their statutorily-mandated functions. First, the union representative (unlike the employee's counsel) serves the collective bargaining unit as a whole, and not just the individual employee who is the subject of the investigatory interview. The OIG thus reasonably fears that the *Weingarten* representative will share information learned in the investigatory interview with other members of the collective bargaining unit who might subsequently be interviewed or requested to produce documents in the OIG investigation. Second, under the Authority's precedent, when the *Weingarten* rule applies, it includes not only the right to the assistance of a union representative at the interview, but also an array of rights that would fetter the OIG's ability to conduct an investigation, from the right to prior notice of questions to a right to defer the interview for up to 48 hours.[9]

Moreover, the Authority has ruled that "nothing in section 7114(a)(2) * * * prevents parties from negotiating contractual rights to union representation beyond those provided by that section." *United States Dep't of Justice, Justice Management Div.*, 42 FLRA 412, 435 (1991). In particular, in *United States Nuclear Regulatory Comm'n*, 47 FLRA 370 (1993), the Authority ruled that organized components of an agency are required to negotiate regarding the "procedures" (5 U.S.C. 7106(b)(2)) and "appropriate arrangements" (5 U.S.C. 7106(b)(3)) that apply specifically to OIG investigations, even though OIGs are exempt from

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[9] The Authority has interpreted the *Weingarten* rule to include the right to be informed in advance of the general subject of an examination so that the employee and union representative may consult before questioning begins, see *FAA, New Eng. Region, Burlington, Mass.*, 35 FLRA 645, 652-54 (1990); the right to halt the examination and to step outside the hearing of investigators to discuss with the union representative answers to the investigator's questions, see *United States Dep't of Justice, INS*, 46 FLRA 1526, 1553-1555, 1565-1569 (1993), rev'd on other grounds, *DOJ, supra* (reversal on the ground that the rule does not apply to OIGs); and the right to negotiate for 48-hours' notice before an investigator can begin an examination of a union employee, see *U.S. Department of Justice, INS*, 40 FLRA 521, 549 (1991), rev'd on other grounds *sub nom., United States Dep't of Justice, INS* v. *FLRA*, 975 F.2d 218, 224-226 (5th Cir. 1992).

collective bargaining under the FSLMRS. Although that decision was reversed by the Fourth Circuit in *NRC*, we are unaware of any indication that the Authority would not apply it outside the Fourth Circuit in the absence of controlling contrary authority.

Finally, the FLRA's order prevents NASA-OIG from questioning a NASA bargaining unit employee without union participation no matter how serious the matter or what emergency circumstance might necessitate immediate questioning. App., *infra*, 52a-53a. Consequently, a determination as to whether the rule applies to OIG investigators may determine whether a particular matter can be effectively investigated by the OIG.

The continuing importance of the issue is underscored by the pendency of many unfair labor practice charges brought by federal employee unions against OIGs and the agencies in which they operate for alleged violations of the *Weingarten* statute. See, *e.g.*, *U.S. Dep't of Justice, Office of Inspector General*, Case No. WA-CA-80156 (motion for summary judgment and cross-motions to dismiss pending before FLRA); *Social Security Admin., Headquarters and Social Security Admin. Office of Inspector General*, Nos. AT-CA-60874 & 60875 (consolidated) (pending before FLRA); *USDA Farm Serv. Agency and USDA Office of Inspector General*, No. DE-CA-60399 (exceptions to ALJ decision pending before FLRA); *U.S. Dep't of Justice, Office of Inspector General*, Case No. DE-CA-80076 (motion for summary judgment and cross-motion to dismiss pending before FLRA); *Social Security Admin. Headquarters and Social Security Admin., Office of Inspector General*, Nos. SF-CA-80172 & 80174 (consolidated) (pending before FLRA); *U.S. Dep't of Justice, Federal Bureau of Prisons*, Case No. SF-CA-80415 (complaint pending before the FLRA); *U.S. Dep't of Justice, Office of Inspector General*, Case No. SF-CA-80424 (complaint pending before FLRA). Thus, there is no question that the issue will recur.

Moreover, the circuit conflict creates uncertainty for OIGs as to which rules apply to which interviews and investigations. In this case, for example, review was appropriately sought in both the D.C. and Eleventh Circuits, see *supra* pp. 8-9, which now have conflicting rules. Before conducting an investigative interview, the OIG has no ability to determine which court of appeals will ultimately be called upon to decide the case. A single investigation might involve some interviews that are exempt from the *Weingarten* rule and some that are not, with the latitude afforded to the investigator and the rights enjoyed by the employee turning on where the person lives and transacts business and, in the event of multiple petitions, the vicissitudes of the court of appeals assignment process. This Court's review is essential to resolve the conflict, which has serious day-to-day consequences for an OIG's ability to perform its mission of investigating fraud and abuse within the federal government in a consistent and effective manner.

2. The court below also held that NASA Headquarters was liable for an unfair labor practice because NASA-OIG decided not to afford the employee statutory *Weingarten* rights. That conclusion is inconsistent with the construction of 5 U.S.C. 7114(a)(2)(B) and the Inspector General Act outlined above. If an OIG cannot be held to have committed an unfair labor practice because it is not a "representative of the agency," the agency headquarters itself cannot be liable for the OIG's actions.

Even if an OIG could be charged with an unfair labor practice for violating a federal employee's statutory *Weingarten* rights, it would not logically follow that an agency headquarters is also liable for the OIG's action. The decision below incorrectly construed the Inspector General Act and the FSLMRS to hold NASA Headquarters liable for the NASA-OIG's actions in this case. See App., *infra*, 19a. Because the D.C. Circuit in *DOJ* and the Second Circuit in *FLRA* v. *DOJ* found no unfair labor practice from the OIG's denial of a union representative at an interview, they had no occasion to address whether the agency headquarters would be legally responsible for the OIG's actions. In their reliance on the Inspector General Act, however, those courts made clear that they would have reached a result different from the Eleventh Circuit on that issue.

Similarly, the decision below cannot be reconciled with the rationale underlying the Fourth Circuit's decision in *NRC*. See 25 F.3d 229. In that case, the court considered whether the OIG's manner of conducting investigations was a proper subject of collective bargaining between the agency and the union. The court held that it was not. *Id.* at 234. The court reasoned that to permit such bargaining "would impinge on the statutory independence of the Inspector General." *Ibid.* "One of the most important goals of the Inspector General Act was to make Inspectors General independent enough that their investigations and audits would be wholly unbiased." *Id.* at 233. The court further rejected the FLRA's argument that "the power of 'general supervision' given to the two top agency heads could be used to limit or restrict the investigatory power of the Inspector General." *Ibid.* The court then noted its disagreement with how the FLRA had "chosen to expand the limited holding of

Defense Criminal Investigative Service" because such an expansion "would directly interfere with the ability of the Inspector General to conduct investigations." *Id.* at 235.

The decision below is inconsistent with the Fourth Circuit's reasoning. If an agency cannot bargain over the manner in which an OIG conducts investigations, it follows that an agency also cannot order an OIG to comply with an interpretation of law about which the OIG might have a good-faith disagreement. That concern is not hypothetical. As the examples in *supra* note 9 demonstrate, the scope of statutory *Weingarten* rights is uncertain. An OIG and an agency headquarters could reasonably disagree over whether an investigator must follow certain procedures to comply with rules that the FSLMRS does not elucidate but that eventually become law through FLRA decisions. An order by agency headquarters to an OIG to comply with such a procedure would "directly interfere with the ability of the Inspector General to conduct investigations," *NRC*, 25 F.3d at 235, in the same ways that an agency's collective bargaining over the OIG's investigative methods and procedures adversely affects an OIG's independence.

The Court would not reach the second issue presented if it agreed with our submission that an OIG is not a "representative of the agency" under 5 U.S.C. 7114(a)(2)(B). A reversal on the first issue would also require a reversal of the unfair labor practice charged against NASA Headquarters. But because of the way the courts of appeals have addressed the interplay between the FSLMRS and the Inspector General Act, full consideration on the merits is also warranted for the second question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1998

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 95-6630, 95-6690

FEDERAL LABOR RELATIONS AUTHORITY,
PETITIONER

v.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION WASHINGTON, D.C., AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, OFFICE OF THE INSPECTOR GENERAL, WASHINGTON, D.C.,
RESPONDENTS

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO,
INTERVENOR

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION WASHINGTON, D.C., AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, OFFICE OF THE INSPECTOR GENERAL, WASHINGTON, D.C.,
PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY,
RESPONDENT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO,
INTERVENOR

Sept. 2, 1997

Before: COX, Circuit Judge, KRAVITCH, Senior Circuit Judge, and STAGG*, Senior District Judge.

KRAVITCH, Senior Circuit Judge:

The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101, *et seq.*, ("FSLMRS" or the "Statute") grants federal employees the right to be represented by a union representative at an investigatory examination conducted by "a representative of the agency" if the employee reasonably believes that the examination may result in disciplinary action. 5 U.S.C. § 7114(a)(2). We must decide, in the face of conflicting circuit authority, whether the Federal Labor Relations Authority ("FLRA" or the "Authority") properly concluded that an investigator from an agency's Office of the Inspector General ("OIG") is "a representative of the agency" within the meaning of § 7114(a)(2)(B).

I.

This case arose out of an investigation of an employee of the George C. Marshall Space Flight Center ("MSFC"), a component of the National Aeronautics and Space Administration ("NASA-HQ") that is located in Huntsville, Alabama. The NASA Office of the Inspector General ("NASA-OIG"), which is also a component of NASA-HQ, received information from the Federal Bureau of Investigation ("FBI") in January 1993 linking the MSFC employee to several documents that set forth potential threats and plans for violence against his MSFC co-workers. NASA-OIG immediately began to investigate whether the employee had in fact authored these documents. When NASA-OIG Special Agent Larry Dill contacted the employee to arrange an

* Honorable Tom Stagg, Senior U.S. District Judge for the Western District of Louisiana, sitting by designation.

interview, the employee requested both legal and union representation, and Dill agreed to this request.[1]

At the outset of the interview, Dill stated that the union representative was present only to serve as a witness and was not to interrupt questions or answers.[2] Dill further informed the union representative, Patrick Tays, that he could be called as a witness for the government in the future. Tays objected to these grounds rules, and Dill responded by stating that he would cancel the interview if Tays did not comply with them. On a number of occasions during the examination, Dill challenged Tays's efforts to represent the employee.

Local 3434 of the American Federation of Government Employees ("AFGE"), the exclusive representative of the bargaining unit employees at the MSFC, filed a complaint pursuant to 5 U.S.C. § 7116(a)(1), (8) charging NASA-OIG and NASA-HQ with commiting an unfair labor practice.[3] The complaint alleged that NASA-OIG and NASA-HQ violated 5 U.S.C. §

[1] By this time, NASA-OIG had determined that no criminal action would be taken again the employee.

[2] According to the interview ground rules established by Dill, if the MSFC employee did not answer the questions asked of him, he would face dismissal.

[3] Section 7116(a) provides:

For the purpose of this chapter, it shall be an unfair labor practice for an agency–

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

* * * * *

(8) to otherwise fail or refuse to comply with any provision of this chapter.

7114(a)(2)(B) by interfering with the union's representation of the employee at the interview with Dill. After a hearing, the Administrative Law Judge ("ALJ") determined that Dill's action violated the union's right to take an active role at the investigatory examination. It therefore found NASA-OIG guilty of an unfair labor practice, but concluded that NASA-HQ was not responsible for the actions of the OIG investigator, NASA-OIG filed exceptions to the ALJ's rulings.

Upon review of the ALJ's order, the Authority determined that the ALJ had properly concluded that Special Agent Dill was a "representative of the agency" and that NASA-OIG was guilty of an unfair labor practice. The Authority disagreed, however, with the ALJ's ruling with respect to NASA-HQ, concluding that NASA-HQ, as the parent agency of NASA-OIG, was also responsible for the violation of § 7114(a)(2)(B). The Authority therefore ordered NASA-OIG and NASA-HQ to cease and desist from interfering with the representational rights granted by § 7114(a)(2)(B). It further directed NASA-HQ to post appropriate notice forms and to order NASA-OIG to comply with the requirements of § 7114(a)(2)(B) when conducting investigatory examinations.

NASA-HQ and NASA-OIG petitioned for review of the Authority's determination, and the Authority filed a cross-application for enforcement of its order. We subsequently granted AFGE's motion for leave to intervene in this appeal.

II.

We review decisions of the FLRA in accordance with § 706 of the Administrative Procedure Act, *see* 5 U.S.C. § 7123(c), and will set aside only those Authority actions

that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In determining whether an action is in "accordance with law," we defer to the Authority's interpretation of the FSLMRS because of its specialized expertise in the field of federal labor relations. *See Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 96, 104 S. Ct. 439, 444, 78 L.Ed.2d 195 (1983) ("*ATF* "); *Fort Stewart Sch. v. FLRA*, 860 F.2d 396, 405 (11th Cir. 1988), aff'd, 495 U.S. 641, 110 S. Ct. 2043, 109 L.Ed.2d 659 (1990). Thus, in considering an ambiguous provision of the FSLMRS, we are bound to uphold the Authority's construction as long as it is "reasonable and defensible." *ATF*, 464 U.S. at 96, 104 S. Ct. at 444.

In contrast, we grant no deference to the Authority's construction of a federal statute outside the field of federal labor relations. *See United States Nuclear Regulatory Commission v. FLRA*, 25 F.3d 229, 232 (4th Cir. 1994) ("*NRC*"); *FLRA* v. *Department of Defense*, 977 F.2d 545, 547 n. 2 (11th Cir. 1992). Similarly, when the Authority "resolves an arguable conflict between another statute and its own, we are required to make a wholly independent analysis of that issue." *Defense Criminal Investigative Service v. FLRA*, 855 F.2d 93, 98 (3d Cir. 1988) ("*DCIS*").

Accordingly, we undertake a bifurcated review of the Authority's decision in this case. We will review with deference the Authority's interpretation of § 7114(a)(2)(B) and will uphold its conclusions with respect to this section as long as they are reasonable and defensible. We will determine independently, however, whether the Authority's construction of this section of its own statute impermissibly conflicts with another federal

statute, namely the Inspector General Act of 1978, 5 U.S.C. app. 3 §§ 1-12. Accord *NRC*, 25 F.3d at 232; *DCIS*, 855 F.2d at 97-98.

III.

Congress enacted § 7114(a)(2)(B) to extend the rights established for private sector employees in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 95 S. Ct. 959, 43 L.Ed.2d 171 (1975), to federal employees. *See* 124 Cong. Rec. 29, 184 (daily ed. Sept. 13, 1978) (statement of Rep. Udall); *DCIS*, 855 F.2d at 96. Section 7114(a)(2) provides:

> An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at . . .
>
> (B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if–
>
> (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
>
> (ii) the employee requests representation.

In this case, it is undisputed that the employee reasonably believed that the examination would result in disciplinary action and that he requested representation. Moreover, NASA-OIG now concedes that the actions of Special Agent Dill interfered with the union's right to be represented at the investigatory interview.[4] Whether or not NASA-OIG violated § 7114(a)(2)(B)

[4] The Authority held that the overly restrictive ground rules set forth by Dill violated the Statute, and NASA-OIG has not appealed this aspect of the Authority's decision.

thus depends solely on whether Special Agent Dill was a "representative of the agency" when he conducted the examination.

Two circuits have considered the status of OIG investigators under § 7114(a)(2)(B) and have reached opposite conclusions. In *Defense Criminal Investigative Service* v. *FLRA*, the Third Circuit held that investigators of the Defense Criminal Investigative Services ("DCIS"), a subdivision of the Department of Defense ("DOD") under the authority of that agency's Inspector General, are bound by the terms of this section. 855 F.2d 93 (3d Cir. 1988) ("*DCIS* "). The court concluded that "[i]t is apparent from the face of the statute that Congress wanted federal employees to have the assistance of a union representative when they were placed in a position of being called upon to supply information that would expose them to the risk of disciplinary action." *Id.* at 98-99. The court expressly rejected DCIS's contention that "representative of the agency" referred only to members of the bargaining unit with which the employee's union has a collective bargaining agreement. *Id.* at 99-100.

In *Department of Justice v. FLRA*, 39 F.3d 361 (D.C. Cir. 1994) ("*DOJ*"), the D.C. Circuit concluded that the DOJ's Office of the Inspector General was not the "agency" Congress intended under § 7114(a)(2)(B) because it had no collective bargaining relationship with the union. *Id.* at 365-66. In holding that interviews with DOJ's OIG investigators are not governed by the federal *Weingarten* provision, the *DOJ* court relied on the independence and authority granted Inspector Generals by the Inspector General Act of 1978, 5 U.S.C. app. 3 §§ 1-12 ("IG Act"). "[T]he Inspector General's independence and authority would necessarily be com-

promised if another agency of government—the Federal Labor Relations Authority—influenced the Inspector General's performance of his duties on the basis of its view of what constitutes an unfair labor practice." *Id.* at 367.

In the face of these conflicting opinions, the Authority independently analyzed the terms of § 7114(a)(2)(B). It first determined that NASA-HQ was the relevant agency under this section. *See* 5 U.S.C. § 7103(a)(3) (defining "agency" to mean an "Executive agency"). The Authority then concluded that NASA-OIG should be considered a representative of NASA-HQ for the purposes of § 7114(a)(2)(B) because it is a subcomponent of NASA-HQ and provides investigatory information to NASA-HQ and to other agency subcomponents for use in disciplinary proceedings.

The Authority rejected NASA-OIG's assertion that § 7114(a)(2)(B) applies only to examinations conducted by an employee of a component of the agency that has a collective bargaining relationship with the union. Implying such a requirement, the Authority reasoned, would frustrate Congress's intent to provide federal employees the assistance of a union representative whenever they are called upon to provide information that exposes them to the risk of disciplinary action. The Authority further concluded that application of the *Weingarten* protection to OIG interviews did not threaten NASA-OIG's independence or otherwise conflict with the IG Act.

NASA-OIG contends that the Authority erred in construing the terms of § 7114(a)(2)(B). It claims that all of the rights and duties enumerated in § 7114 derive from a collective bargaining relationship and thus do not extend to parties outside that relationship. More

specifically, NASA-OIG argues that "representative of the agency" refers only to a representative of the agency or agency component that engages in collective bargaining with the union at issue.[5] NASA-OIG notes that in § 7114(a)(2)(A), Congress used "representative of the agency" in referring to discussions concerning matters under the collective bargaining agreement. *See* 5 U.S.C. § 7114(a)(2)(A). NASA-OIG also points to § 7103(a)(12), which defines collective bargaining as the performance of the mutual obligation of good-faith bargaining imposed on "the representative of an agency" and the exclusive representative of employees in an appropriate unit in the agency. *See* 5 U.S.C. § 7103(a)(12).

After a careful examination of the text and motivating purposes of § 7114(a)(2)(B), we find no error in the Authority's interpretation of "representative of the agency." NASA-OIG's textual arguments, although not wholly without merit, do not convince us that Congress could not have intended the result reached by the Authority. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). In § 7103(a)(3), Congress defined "agency" to include executive agencies, and it is undisputed that NASA-HQ falls within the statutory definition of "agency." 5 U.S.C. § 7103(a)(3). Nothing in the text of § 7114(a)(2)(B) indicates to us that Congress intended a different meaning when it used "agency" in § 7114(a)(2)(B). The

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[5] Neither NASA-OIG nor NASA-HQ has a collective bargaining relationship with the employee's union. As NASA-OIG notes, the Statute excludes Inspector Generals from the collective bargaining process. *See* 5 U.S.C. § 7112(b)(7); *DOJ*, 39 F.3d at 365 n.5.

fact that Congress elsewhere used "representative of the agency" and "representative of an agency" in the context of collective bargaining matters does not establish in our view that Congress must have intended to depart from the statutory definition of "agency" and to imply a collective bargaining requirement in § 7114(a)(2)(B). *Accord DCIS*, 855 F.2d at 100.

Moreover, we agree with the Authority that reading such a requirement into "representative of the agency" in § 7114(a)(2)(B) would undermine Congress's purpose in enacting this section. Congress enacted § 7114(a)(2)(B) to extend *Weingarten* protection to federal employees. *See* 124 Cong. Rec. 29, 184 (daily ed. Sept. 13, 1978) (statement of Rep. Udall). In *Weingarten*, the Court upheld the NLRB's ruling entitling employees who "seek[ ] 'aid or protection' against a perceived threat to employment security" to union representation during intimidating investigatory confrontations. 420 U.S. at 260, 95 S. Ct. at 965. In enacting § 7114(a)(2)(B), Congress also sought to provide for "union representation at investigatory interviews which the employee reasonably believes may result in disciplinary action against him." 124 Cong. Rec. 29, 184 (daily ed. Sept. 13, 1978) (statement of Rep. Udall) (quoting *Weingarten*, 420 U.S. at 267, 95 S. Ct. at 968). The Statute, like the *Weingarten* rule itself, focuses on the risk of adverse employment action to the employee. Because this risk does not disappear or diminish significantly when an investigator is employed in an agency component that has no collective bargaining relationship with the employee's union, we see no reason why the protection afforded by Congress should be eliminated in such situations. *See DCIS*, 855 F.2d at 99 ("[W]e doubt that Congress intended that union

representation be denied to the employee solely because [the investigator was] employed outside the bargaining unit.").

The Authority determined that NASA-OIG performs an investigatory role for NASA-HQ and its components such as MSFC. Moreover, the Authority determined that information obtained during the course of NASA-OIG investigations may be used by NASA components to support administrative or disciplinary actions taken against bargaining unit employees. Under these circumstances, we conclude that the Authority's determination that the NASA-OIG investigator was a "representative of the agency" within the meaning of § 7114(a)(2)(B) is a permissible construction of the Statute.[6]

NASA-OIG nevertheless contends that the Authority's interpretation of § 7114(a)(2)(B), even if otherwise defensible, cannot be sustained because it impermissibly conflicts with the IG Act, 5 U.S.C. app. 3 §§ 1-12. Specifically, NASA-OIG contends that subjecting OIG interviews to the *Weingarten* provision would impermissibly hinder the function of each agency's OIG because the OIG was designed to operate independently of the direct supervision and influence of the agency head and outside the programmatic spheres of the agency. *See DOJ*, 39 F.3d at 367.

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[6] Because this case involved only potential administrative rather than criminal consequences for the employee, we need not determine the availability or scope of § 7114(a)(2)(B) protection in the context of criminal investigatory examinations and need not determine whether Congress intended "representative of the agency" to extend to agency components which, unlike NASA-HQ, have authority to investigate wrongdoing outside of the parent agency.

We find nothing in the text or legislative history of the IG Act, however, to justify exempting OIG investigators from compliance with the federal *Weingarten* provision. No provision of the IG Act suggests that Congress intended to excuse OIG investigators from honoring otherwise applicable federal statutes.[7] Moreover, we do not find a sufficient conflict between the purpose of the IG Act and the mandate of § 7114(a)(2)(B) so that we would imply such an exemption into the text of the IG Act. *See DCIS*, 855 F.2d at 100.

Congress created the Offices of the Inspector General in order "to more effectively combat fraud, abuse, waste and mismanagement in the programs and operations" of certain specified federal agencies. S. Rep. No. 95-1071, 95th Cong., 2d Sess., *reprinted in* 1978 U.S.C.C.A.N. 2676, 2676 (1978); *see also* 5 U.S.C. app. 3 § 2. In order to accomplish these goals, Congress believed it necessary to grant OIGs a significant degree of independence from the agencies they were charged with investigating. For example, even though Inspector Generals are under the "general supervision" of the agency head, only the President, not the agency head, may remove an Inspector General. 5 U.S.C. app. 3 § 3(a), (b). Neither the agency head nor the deputy may

[7] In certain statutes, Congress has expressly insulated the authority of investigatory organizations from encroachment by otherwise applicable statutes. *See, e.g.*, 28 U.S. C. § 535(a) (granting FBI authority to investigate "any violation of title 18 involving Government officers and employees [] notwithstanding any other provision of law"). Courts have read such language to excuse compliance with the FSLMRS. *See New Jersey Air National Guard v. FLRA*, 677 F.2d 276, 283 (3d Cir.) (construing 32 U.S.C. § 709), *cert. denied*, 459 U.S. 988, 103 S. Ct. 343, 74 L.ED.2d 384 (1982).

"prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation." 5 U.S.C. app. 3 § 3(a). And apart from the limited supervision of the top two agency heads, no one else in the agency may provide any supervision to the Inspector General. *Id.* ("[The Inspector General] shall not report to, or be subject to supervision by, any other officer of [the agency]."); *see also* NRC 25 F.3d at 233-35 (characterizing agency head supervision of OIG as "nominal");[8] *DOJ*, 39 F.3d at 367 (discussing independence of OIG).

In Congress's view, such independence was necessary to prevent agency managers from covering up wrongdoing within their agencies in order to protect their personal reputations and the reputations of their agencies. In light of the potentially conflicting agendas of agency management and Inspector Generals, Congress created the safeguards necessary to ensure that Inspector Generals could conduct their investigations without interference from agency management personnel. *See* S. Rep. No. 95-1071, 95th Cong., 2d Sess.

[8] In *NRC*, the Fourth Circuit held that the union could not require the agency to negotiate rights relating to OIG interviews. *Id.* at 235. It reasoned that allowing the union and management to negotiate these rights would provide management an opportunity to interfere with the OIG's investigatory tools and would therefore conflict with Congress's intent to make the OIG independent from agency management. *Id.* at 234. We do not consider the holding or reasoning of the Fourth Circuit to be inconsistent with the Third Circuit's opinion in *DCIS*. Both cases recognize that the OIGs must remain independent from agency management if they are to be able to fulfill their statutory fucntion. *See NRC*, 25 F.3d at 233; *DCIS*, 855 F.2d at 98. Moreover, the court in *NRC* did not reject the reasoning of *DCIS*, but instead merely distinguished its "limited holding." *NRC*, 25 F.3d at 235.

(1978), *reprinted in* 1978 U.S.C.C.A.N. 2676, 2682; *DCIS*, 855 F.2d at 98 ("[T]he purpose of these provisions was to insulate Inspector Generals from pressure from agency management which might attempt to cover up its own fraud, waste, ineffectiveness or abuse."). We do not believe that the presence of a union representative at OIG interviews, as mandated by federal statute, creates the type of interference from which Congress sought to insulate OIG investigators. The employees' statutory right to union representation does not provide management with an opportunity to interfere with OIG investigations or to cover up fraud or waste within its own agency.

Moreover, we do not believe that the presence of a union representative will impermissibly hinder the OIG's ability to perform its essential function of detecting and preventing fraud and abuse within the agencies. The *Weingarten* representative is present only to assist the employee, and the employer is free to insist in hearing only the employee's own account of the matter under investigation. *See Weingarten*, 420 U.S. at 260, 95 S. Ct. at 965. The representative's presence "need not transform the interview into an adversary process." *Id.* at 263, 95 S. Ct. at 966. Although NASA-OIG has suggested that *Weingarten* rights have been expanded by the Authority, it points to no specific examples in which the assertion of *Weingarten* rights has interfered with OIG investigations. Moreover, we do not see how the right of an employee to be represented by a union representative presents a significantly greater interference with OIG interviews than the existing right of an employee to be represented at such interviews by an attorney. See 5 U.S.C. § 555(b) (providing for the right to be advised and represented by counsel for anyone

compelled to appear in person before an agency or agency representative).

We therefore conclude that allowing a union employee to exercise the full rights granted to him or her by § 7114(a)(2)(B) is not sufficiently inconsistent with the IG Act to justify an implied exemption for OIG investigators. *See DCIS*, 855 F.2d at 101 ("Given the limited function of a *Weingarten* representative, it is conceivable to us that Congress might conclude that the employee's interest in representation outweighs the limited interference that his or her representative's presence might occasion in [OIG] interviews."). If in the future, *Weingarten* representatives operate to impede OIG investigations, it would be the responsibility of Congress and not the courts to fashion a solution to such a problem.[9] But absent a discernible present conflict between the IG Act and § 7114(a)(2)(B), we refuse to read the IG Act to have impliedly repealed this section of the FSLMRS. See *Morton v. Mancari*, 417 U.S. 535, 551, 94 S. Ct. 2474, 2483, 41 L.Ed.2d 290 (1974) ("[I]t is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each [statute] as effective."). Accordingly, we conclude that the Authority correctly determined that OIG Special Agent Dill was a "representative of the agency" within the meaning of § 7114(a)(2)(B) and, because of Dill's conduct at the investigatory interview, that NASA-OIG was guilty of an unfair labor practice.

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[9] Because Inspector Generals report semi-annually to Congress, *see* 5 U.S.C. app. 3 § 5(b)(1), they will have the opportunity to alert Congress to any difficulties that the assertion of *Weingarten* rights may create in the future.

IV.

Having determined that the Authority properly concluded that NASA-OIG violated § 7116(a), we now must determine whether the Authority correctly determined that NASA-HQ was also responsible for this violation. NASA-HQ asserts two challenges to the Authority's ruling. First, it argues that the ruling cannot be enforced because the decision "lacked procedural fairness." Second, NASA-HQ contends that the Authority erred in holding it liable for the actions of the OIG investigator because NASA-OIG is not under its direct supervision.

Because NASA-HQ did not raise these arguments before the Authority, we cannot consider them "unless the failure or neglect to urge the objection is excused because of extraordinary circumstances." 5 U.S.C. § 7123(c). We conclude that extraordinary circumstances are present in this case. The Authority raised the issue of NASA-HQ's liability *sua sponte* when no issues relating to NASA-HQ were before the Authority and filed for enforcement of its order on the same day the order was issued. Although NASA-HQ should have petitioned the Authority for reconsideration of its ruling on this issue, *see* 5 C.F.R. § 2429.17, we find that the circumstances of this case justify our consideration of the arguments raised by NASA-HQ. *Cf. EEOC v. FLRA*, 476 U.S. 19, 23, 106 S. Ct. 1678, 1681, 90 L.Ed.2d 19 (1986) (suggesting that *sua sponte* treatment of issue by Authority may excuse failure to request reconsideration); *NLRB v. FLRA*, 2 F.3d 1190, 1196-97 (D.C. Cir. 1993) (failure to file for rehearing was excusable because of "almost *sua sponte*" nature of Authority's decision and because motion for reconsideration would have been futile). In reviewing the Authority's determination with respect to NASA-HQ, we are mindful that we shall not set aside Authority action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 7123(c).

NASA-HQ claims that the Authority's ruling lacked procedural fairness because, as the Authority recognized, no exceptions had been filed with respect to the ALJ's recommendation that the unfair labor practice complaint against NASA-HQ be dismissed. The Authority nevertheless determined that it was proper for it to address that issue because NASA-HQ was a party pursuant to 5 C.F.R. § 2421.11(b)(1)(i) ("party" means any agency "named as [a] charged party in a charge"), and because the Authority had previously addressed *sua sponte* matters that had not been excepted to by the parties. *See*, e.g., *United States Immigration and Naturalization Service, United States Border Patrol, San Diego Sector, San Diego, California*, 43 FLRA 642, 654 (1991), *enforced sub nom. United States Immigration and Naturalization Service v. FLRA*, 12 F.3d 882 (9th Cir. 1993); *see also* 5 C.F.R. § 2423.29(a) ("After considering the Administrative Law Judge's decision, the record, and any exceptions and related submissions filed, the Authority shall issue its decision affirming or reversing the Administrative Law Judge, in whole, or in part, or making such other disposition of the matter it deems appropriate . . . "). NASA-HQ provides us with no authority indicating that the FLRA's conclusion that it had the power to modify the ALJ's rulings on grounds not excepted to by the parties is not entitled to deference.[10]

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[10] NASA-HQ's claim of "lack of procedural fairness" is further undermined by the fact that it was named as a party in the original complaint, had adequate notice of the charges against it, and chose

We now turn to the merits of the Authority's decision holding NASA-HQ responsible for the actions of NASA-OIG and directing NASA-HQ to order NASA-OIG to comply with the requirements of § 7114(a)(2)(B). The Authority previously has recognized that a component of an agency violates § 7116(a)(1) of the Statute when it "engages in conduct which unlawfully interferes with the protected rights of employees of another component." *See Headquarters, Defense Logistics Agency, Washington, D.C.*, 22 F.L.R.A. 875, 884 (1986). And the Authority has held parent agencies responsible for statutory violations committed by its subcomponents even when the parent does not have a collective bargaining relationship with the union. *See U.S. Dep't of Veterans Affairs, Washington, D.C.*, 48 F.L.R.A. 991, 1000-01 (1993); *Headquarters, U.S. Air Force, Washington, D.C. and 375th Combat Support Group, Scott Air Force Base, Ill.*, 44 F.L.R.A. 117, 125 (1992), *rev. denied sub nom., Headquarters, U.S. Air Force, Washington, D.C.* v. *FLRA*, 10 F.3d 13 (D.C. Cir. 1993).

In this case, the Authority found NASA-HQ guilty of an unfair labor practice because, as the parent agency, it failed to ensure that NASA-OIG complied with § 7114(a)(2)(B). The Authority found that investigative information obtained by NASA-OIG can be a basis upon which NASA-HQ disciplinary action is taken and that NASA-OIG reports to and is under the general supervision of NASA-HQ. Based on these findings, the

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not to attend the hearing before the ALJ. Moreover, NASA-HQ had an opportunity to petition for reconsideration of the Authority's ruling but neglected to do so. The fact that NASA-HQ and NASA-OIG are part of the same agency and now represented by the same attorneys on appeal also suggests to us that NASA-HQ was not deprived of procedural fairness.

Authority concluded that the purposes of § 7114(a)(2)(B) would be served by requiring NASA-HQ to advise NASA-OIG of its obligation to comply with the Statute.

Although NASA-OIG is an "independent and objective" unit of NASA-HQ, *see* 5 U.S.C. app. 3 § 2, NASA-OIG is subject to the general supervision of the agency head. 5 U.S.C. app. 3 § 3(a). In conducting investigations within the agency, NASA-OIG serves the interest of NASA-HQ by soliciting information of possible misconduct committed by NASA employees. The fact that the NASA-OIG agent in this case ordered the employee to answer questions or face dismissal further suggests that the investigator was acting for NASA-HQ when it conducted the interview. We therefore find no clear error in the Authority's determination that NASA-HQ should be held responsible for the investigator's violation of § 7114(a)(2)(B).

Moreover, we conclude that the Authority's order directing NASA-HQ to order NASA-OIG to comply with the terms of this section does not intrude on the independence of NASA-OIG. As discussed earlier, the OIG need only have enough independence from agency management so that it can effectively discover and cure abuses and inefficiency within the agency. Requiring agency management to order the OIG to comply with a congressional directive does not in our view intrude on the statutory independence of the OIG. We therefore hold that the Authority did not abuse its discretion when it found NASA-HQ responsible for the unfair labor practice and directed it to order NASA-OIG to comply with the Statute.

V.

Accordingly, NASA's petition for review is DENIED and the FLRA's application for enforcement of its order is GRANTED.

APPENDIX B

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

HEADQUARTERS
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
WASHINGTON, D.C.
(RESPONDENT)

and

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
OFFICE OF THE INSPECTOR GENERAL
WASHINGTON, D.C.
(RESPONDENT)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 3434
(CHARGING PARTY/UNION)

AT-CA-30481

DECISION AND ORDER

July 28, 1995

Before the Authority: PHYLLIS N. SEGAL, Chair; TONY ARMENDARIZ and PAMELA TALKIN, Members.

I. *Statement of the Case*

This unfair labor practice case is before the Authority on exceptions to the attached decision of the Administrative Law Judge filed by the Respondent National Aeronautics and Space Administration, Office of the Inspector General, Washington, D.C. (NASA, OIG). The General Counsel filed an opposition to the Respondent's exceptions.

The complaint alleges that Respondents Headquarters, National Aeronautics and Space Administration, Washington, D.C. (NASA, HQ) and NASA, OIG violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by failing to comply with the provisions of section 7114(a)(2)(B) of the Statute. Specifically, the complaint alleges that the Respondents refused to allow a Union representative to actively participate in an examination of a unit employee held pursuant to section 7114 (a)(2)(B). The Judge found that NASA, OIG violated the Statute as alleged, and recommended dismissal of those portions of the complaint that allege violations of the Statute by Respondent NASA, HQ.

For the reasons explained below, we find first that NASA, OIG's investigatory examination of a unit employee was conducted in a manner that violated section 7114(a)(2)(B) of the Statute because the exclusive representative was precluded from actively participating in the examination. Second, we find that the NASA, OIG investigator who conducted the investigatory examination is a "representative of the agency" within the meaning of section 7114(a)(2)(B) of the Statute. Third, we find that both NASA, OIG and NASA, HQ violated the Statute.

II. *Judge's Decision*

A. *Judge's Findings of Fact*

The facts, which are set forth fully in the attached Judge's decision, are summarized here. The George C. Marshall Space Flight Center (MSFC) at Huntsville, Alabama is a component of the National Aeronautics and Space Administration (NASA), headquartered in Washington, D.C. NASA, OIG is also a component of NASA and is similarly headquartered in Washington, D.C. Offices of NASA, OIG are maintained at all NASA component operations, including MSFC. Although NASA, OIG agents are assigned to local NASA centers, they do not report to officials at such centers, including MSFC. Rather, through a chain of command they report to NASA, OIG headquarters in Washington, D.C. The Inspector General, in turn, reports to the Administrator of NASA, the head of the agency. The American Federation of Government Employees, Local 3434, is the exclusive representative of an appropriate unit of MSFC employees.

In 1993, NASA, OIG received information from the Federal Bureau of Investigation (FBI) pertaining to an employee at MSFC. The employee, referred to as P,[11] was linked to documents that purportedly might pose a serious threat to co-workers. The information was conveyed to NASA, OIG investigator Larry Dill at MSFC.[12] When Dill contacted P to set up an interview,

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[11] The Judge referred to the employee as "P" due to the nature of the allegations against him and the limited relief requested by the General Counsel.

[12] Dill determined, after consulting appropriate investigative agencies, that employee P had not violated the law and, as a result,

P requested both legal and Union representation. Dill agreed.

Dill's investigative examination of P took place in P's attorney's office. Also present were Union representative Patrick Tays and another NASA, OIG investigator. At the beginning of the interview, Dill read prepared ground rules, which included the following: "The union representative, if present, serves as a witness and is not to interrupt the question and answer process. Additionally, the union representative is subject to being called as a witness for the government." Judge's Decision at 3. Tays objected when the ground rules were read and explained that he was "there to represent the union's and the bargaining unit's interests and P's interests." *Id.* After hearing Tays' objection, Dill read the ground rules statement again. Tays then objected again, arguing that he was not a witness, and Dill responded that he would cancel the meeting and move it someplace else at a different time if Tays did not "'maintain himself.'" *Id.* at 4 (footnote omitted).

During the examination, many of Tays' actions were challenged by Dill. In particular, when Tays asked to see some documents that had been shown to P's attorney, Dill regarded this as "a distinct interruption of the interview process." *Id.* Thereafter, when documents were reviewed, Tays, who was seated at the opposite end of the table, went over and stood behind P and his attorney to view the documents. Later, when Tays cautioned P against speculating in response to a question, Dill responded that Tays could not direct P

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that the matter would be administratively, rather than criminally, investigated. Transcript of hearing at 36.

not to answer the question because, as a witness, "he [Tays] 'was just there.'" *Id.* On the other hand, when P's attorney offered the identical advice regarding the same question, Dill responded: "Okay, fine." *Id.*

Dill's "actions regarding [Tays'] role in the proceeding affected the way P subsequently reacted to Tays' questions or comments." *Id.* As a result, P "ignored [Tays] and paid attention only to his attorney or Dill." *Id.*

B. *Judge's Conclusions*

The Judge found that Dill acted as a "representative of the agency" within the meaning of section 7114(a)(2)(B) when he examined P, and further concluded "that the information secured by [NASA] OIG is referred for administrative or disciplinary action to MSFC. . . ." *Id.* at 5, 6. The Judge thereafter determined that Dill's conduct of the examination interfered with the union's right to take an active role "in assisting the employee to elicit and present facts as contemplated by the Statute." *Id.* at 9. In particular, the Judge found that Tays' objections were both minor and justifiable and did not unduly disrupt or interfere with the objective of the examination. Consequently, the Judge concluded that Tays' conduct did not warrant denying him his right, as the union representative, to take an active role in the examination.

In response to NASA, OIG's argument that Tays was able to fulfill his responsibility to the bargaining unit, the Judge concluded that the fact that Tays may have done so was "immaterial." *Id.* at 9. The Judge further stated: "An agency can not [sic] impose an unduly restrictive limitation on a union representative and later escape responsibility by taking advantage of, or

finding fault with, the representative's conduct under the circumstances." *Id.* at 9-10.

Accordingly, the Judge found that NASA, OIG violated section 7116(a)(1) and (8) of the Statute. Lastly, the Judge recommended that the complaint be dismissed as to NASA, HQ, finding that the record evidence failed to show that it was responsible for the violation.

III. *Positions of the Parties*

A. *Respondent NASA, OIG's Exceptions*

Respondent NASA, OIG excepts to the Judge's holding that NASA, OIG investigator Dill acted as a representative of the agency within the meaning of section 7114(a)(2)(B) of the Statute. NASA, OIG's argument in this regard relies entirely upon the holding of the United States Court of Appeals for the D.C. Circuit in *United States Department of Justice v. FLRA*, 39 F.3d 361, 365-68 (D.C. Cir. 1994) (*DOJ*). NASA, OIG urges the Authority to overrule its precedent stated in *Department of Defense, Defense Criminal Investigative Service; Defense Logistics Agency and Defense Contract Administration Services Region, New York*, 28 FLRA 1145 (1987), *enforced sub nom. Defense Criminal Investigative Service, Department of Defense v. FLRA*, 855 F.2d 93 (3d Cir. 1988) because that precedent is inconsistent with the Inspector General Act of 1978, as amended, 5 U.S.C. app. §§ 1-12 (1988) (IG Act).

NASA, OIG's second exception concerns the Judge's finding that investigator Dill's reading of the ground rules constituted interference with the union representative's right to take an active part in the examination. In support of this exception, NASA, OIG states

that the Judge failed to apply an objective standard in accordance with Authority case law for determining interference under section 7116(a)(1). NASA, OIG further claims that an examination of the ground rules reveals nothing that could reasonably tend to intimidate or coerce the union representative, or from which he could reasonably have drawn a coercive inference.

In its last exception, NASA, OIG asserts that the posting of the Notice should be limited to MSFC, the site of the bargaining unit. In this regard, NASA, OIG points out that the Judge's order requires a posting of the Notice at all NASA facilities where bargaining unit employees are located.[13]

B. *General Counsel's Opposition*

The General Counsel argues that the Authority should affirm the Judge's ruling that the NASA, OIG investigator is a representative of the agency within the meaning of section 7114(a)(2)(B) of the Statute. In this connection, the General Counsel urges the Authority to apply its precedent.

With regard to NASA, OIG's second exception, the General Counsel argues that the Judge correctly concluded that the investigator's conduct of the investigatory examination, including the reading of the threat to cancel the examination when the union representative objected to the ground rules, improperly interfered

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[13] NASA, OIG also excepts to the language of the Judge's cease and desist order. NASA, OIG maintains that the words "its" and "our" (referring to NASA, OIG employees) should be deleted from paragraph 1.(b) of the Order and the second paragraph of the Notice. The General Counsel has no objection to this exception. The modified Order and Notice below reflect the Authority's decision with regard to this matter.

with the union representative's right to take an active part in the examination.

Lastly, the General Counsel maintains that the breadth of the Judge's posting requirement contained in the recommended order is appropriate. In support of this assertion, the General Counsel states that a broad posting requirement is necessary in this case to inform all NASA employees who may come under NASA, OIG's scrutiny of their section 7114(a) (2)(B) rights.

IV. *Analysis and Conclusions*

Two central questions are presented in this case: (1) whether the investigatory examination of P was conducted in a manner that violated the Statute; and (2) whether NASA, OIG investigator Dill was acting as a "representative of the agency" within the meaning of section 7114(a)(2)(B). For the reasons explained below, we answer each of these questions in the affirmative. Having so concluded, we further determine that both NASA, OIG and NASA, HQ violated the Statute, and issue an appropriate remedial order, requiring, among other things, a posting at MSFC.

A. *The Conduct of the Examination Violated Section 7114(a)(2)(B)*

1. *Congressional Codification of "Weingarten"*

An exclusive representative "shall be given the opportunity to be represented at any examination" of a unit employee by an agency representative in connection with an investigation if the employee reasonably believes that discipline may result from the

examination and requests representation.[14] 5 U.S.C. § 7114(a)(2)(B). It is clear from the legislative history that this statutory requirement is intended to provide rights to Federal sector bargaining unit employees consistent with those provided in the private sector by the National Labor Relations Board (Board) in interpreting and applying the National Labor Relations Act and the Supreme Court's decision in *National Labor Relations Board v. J. Weingarten, Inc.*, 420 U.S. 251 (1974) (*Weingarten*). *See* 124 Cong. Rec. 29,184 (1978), *reprinted in* Subcommittee on Postal Personnel and Modernization of the Committee on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, at 926 (*Legislative History*) (Congressman Udall explained that the purpose of the House bill provisions which led to the enactment of section 7114(a)(2)(B) was to reflect the Supreme Court's decision in *Weingarten*); *see also Internal Revenue Service, Washington, D.C., Internal Revenue Service, Hartford District Office v. FLRA*, 671 F.2d 560, 563 (D.C. Cir. 1982).

In *Weingarten*, the Supreme Court recognized that an employee who is questioned during an investigatory examination which may result in discipline "may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors." *Weingarten*, 420 U.S. at 263. Thus, the union representative must be free to help clarify the issues or facts, or to suggest other employees who may have knowledge of them. *Id.* at 260.

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[14] That the employee (1) reasonably feared discipline as a result of the examination and (2) requested union representation are not at issue in this case.

An exclusive representative, whose presence is requested under section 7114(a)(2)(B), also protects "the interests of the entire bargaining unit. A union representative present at an investigatory examination is able to exercise vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly." *Id.* at 260-61.

Finally, the Supreme Court recognized that a union representative's presence at an investigatory examination benefits not only the employee, but the employer as well. In this connection, the Court stated that "[a] knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview." *Id.* at 263.

2. *Case Law Under Section 7114(a)(2)(B) and in the Private Sector*

In accordance with the principles embodied in *Weingarten*, the Authority has consistently held that the purposes underlying section 7114(a)(2)(B) can be achieved only by allowing a union representative to take an active role in assisting a unit employee in presenting facts in his or her defense. *See, e.g., United States Department of Justice, Bureau of Prisons, Safford, Arizona*, 35 FLRA 431, 440 (1990) (*Safford*). Thus, the Authority found an unfair labor practice in *Safford* when a union representative was told to remain silent at an examination. *Id.* This pronouncement is in line with the Authority's longstanding position finding an investigator's unduly aggressive and intimidating behavior during an investigative interview to be unlawful. *See, e.g., Norfolk Naval Shipyard*, 9 FLRA 458 (1982). On the other hand, the Authority has

recognized that a union's representational rights under section 7114(a)(2)(B) may not interfere with an employer's legitimate interest and prerogative in achieving the objective of the examination or compromise its integrity. *Federal Aviation Administration, New England Region, Burlington, Massachusetts*, 35 FLRA 645, 652 (1990).

The Authority has recognized that section 7114(a)(2)(B) rights have their origin in private sector labor law, and in interpreting the Statute, has looked to the Board's development of the *Weingarten* right *See U.S. Immigration and Naturalization Service, New York District Office, New York, New York*, 46 FLRA 1210, 1218-21 (1993) (*INS District Office*), *rev. denied sub nom. American Federation of Government Employees, Local 1917 v. FLRA*, 22 F.3d 1184 (D.C. Cir. 1994) (without opinion).[15] In this regard, the Board has, on several occasions, addressed the role of a union representative at a *Weingarten* examination.

The Board has found unfair labor practices when a union representative was prevented from actively participating in an investigatory interview. In *National Labor Relations Board v. Texaco, Inc.*, 659 F.2d 124, 126-27 (9th Cir. 1981) (*Texaco*), the United States Court of Appeals for the Ninth Circuit affirmed a Board finding of an unfair labor practice, and held that by relegating the union representative "to the role of a passive observer" the company did not afford the employee the representation to which he was entitled.

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[15] However, the Authority has noted Congress' recognition that the right to representation might evolve differently in the private and Federal sectors, and that Board decisions would not necessarily be controlling in the Federal sector. *See INS, District Office*, 46 FLRA at 1218; *Legislative History* at 824.

Similarly, in *United States Postal Service*, 288 NLRB 864, 868 (1988) (*Postal Service I*), the Board found a violation where the union representative was frustrated in his attempts to assist a unit employee because the interviewer expected that the union representative's role be comparable to that of a witness rather than a participant and therefore silenced the union representative whenever he interrupted the interviewer's questioning of the employee. Finally, the Board found a violation in *Greyhound Lines, Inc.*, 273 NLRB 1443, 1448 (1985) (*Greyhound*) where an interrogator advised a union representative at the commencement of an interview that "although he could be present as a witness he would have to remain silent and not participate."

The Board, however, reached a different conclusion in *United States Postal Service*, 303 NLRB 463 (1991) (*Postal Service II*), a case presenting somewhat similar facts as are present in the instant case. There, a bargaining unit employee was the subject of an investigatory examination. Before the union representative arrived, an investigator informed the employee that the representative "would be present only as a witness and instructed [the employee] not to speak to nor look at the union representative. . . ." *Id.* at 470. The Board affirmed the ALJ's finding that no violation had occurred.

The *Postal Service II* ALJ noted that the union representative "expressed herself on several occasions during the interview on [the employee's] behalf, and the postal inspectors listened to her, and interrupted her only after they understood the point she was making." *Id.* The ALJ found that "even though [the union representative] was instructed to be seated behind the em-

ployee in a chair away from the table, whenever it became necessary for her to inspect [the employee's] ledger book which was on the table, she stood up and walked to the table so she could better observe the particular part of the ledger book that the postal inspector was referring to, and the postal inspectors did not object to her doing so." *Id.* Finding that under certain circumstances the pre-interview admonition to the employee "might very well constitute a violation of Section 8(a)(1) of the Act, insofar as it was reasonably calculated to interfere with [the employee's] right to [the union representative's] participation in the interview," the ALJ nevertheless determined that in this case no violation had occurred because "[the union representative], without objection, was permitted to participate in the interview on [the employee's] behalf and in fact did participate on his behalf . . . ." *Id.*

3. *Application of the Case Law*

We find that NASA, OIG investigator Dill's conduct of the examination of employee P prevented union representative Tays from actively participating in the examination, in violation of the Statute and Authority precedent. *See Safford*, 35 FLRA at 440. As the Statute and the above case law indicate, the Authority has uniformly held that a union representative must be given the opportunity to actively participate in an examination of a unit employee conducted pursuant to section 7114(a)(2)(B) of the Statute. In this case, it is clear from the outset of the examination that Dill prevented Tays from playing an active role in the examination. He established intrusive ground rules which relegated Tays to the role of a mere "witness" at the examination. When Tays objected to the nature of the ground rules, Dill reiterated them, and threatened

to cancel the examination and move it to another location if Tays did not comply with his rules. Dill's actions in this case were attempts to preclude representative Tays from actively participating in the interview and thus run afoul of the Statute.

In concluding that the Statute was violated, we have considered the fact that Tays disregarded Dill's ground rules and, at least to some extent, participated in P's examination. However, we find that the statutory violation occurred when the overly restrictive ground rules were announced.[16] An attempt to restrict the union's role at a section 7114(a)(2)(B) examination to that of a witness is not in accordance with the Statute or the decisions of the Authority.[17] We agree with the Judge's conclusion that it is immaterial whether Tays, in fact, was able to fulfill his statutory responsibilities, as an agency cannot impose unduly restrictive limitations on a union representative and later seek to escape responsibility by taking advantage of the representative's conduct under the circumstances. Were the agency so entitled, a union representative would be placed in the untenable position of either complying with the ground rules, *see, e.g., Safford*, 35 FLRA at 431, and thereby failing to fulfill the exclusive representative's statutory responsibilities, or objecting

[16] In response to Tays' objection, had Dill withdrawn or properly revised the ground rules to permit active representation, a different case would be presented. Instead, however, the violation was exacerbated by Dill's reiteration of the ground rules in responding to Tays' objection.

[17] We note that such a constraint upon the union representative's role is similarly not in accord with *Weingarten* or decisions of the Board. *See* A.2., above.

to the ground rules, thus subjecting the representative to charges of disruption or insubordination.

Notwithstanding Tays' attempts at representation during the interview, we find that the imposition of overly restrictive ground rules and the manner in which this interview was conducted had a chilling effect upon the union's exercise of its rights under section 7114(a)(2)(B). Tays testified that the union had no role and that at times P would not listen to him, instead listening only to his attorney.[18] Contrary to the Respondent NASA, OIG's exceptions, we do not find these to be the mere subjective perceptions of representative Tays; rather, we conclude that Dill's insistence upon imposing the restrictive ground rules he announced would reasonably tend to have a coercive or intimidating impact upon any individual seeking to represent an exclusive representative. Additionally, bargaining unit members who become aware of the manner in which this examination was conducted could reasonably conclude that requesting union representation pursuant to section 7114(a)(2)(B) would be futile.[19]

[18] The union's interest at a section 7114(a)(2)(B) examination is not vindicated by the presence of an employee's private counsel. *See American Federation of Government Employees, Local 1941, AFL-CIO v. FLRA*, 837 F.2d 495, 499 n.5 (D.C. Cir. 1988).

[19] We note that in *DOJ*, 39 F.3d at 365 n.2, the D.C. Circuit suggested in dictum that the record did not support a violation because the union representative admitted that there was nothing else that he "wanted to do or planned on doing that [he] couldn't do" in representing the unit employee at the examination. The record testimony distinguishes this case. Here, Tays testified that during the examination: the OIG agents had "run the meeting the way they wanted; the union had no role;" the conditions "really affected me" and the way P reacted to Tays' questions or

In concluding that the Statute was violated in this case, we have considered the NLRB's *Postal Service II* decision wherein the Board found no statutory impropriety under somewhat similar circumstances. There are significant factual variances which distinguish the two cases and justify different results. In *Postal Service II*, the pre-interview rules imposed restrictions on the *employee's* participation at the examination and were announced prior to the union representative's arrival; as a result, the union representative presumably was unaware of the ground rules. In contrast, in this case, the ground rules restricted the *union representative's* participation in the examination and were read to the union representative at the examination. Moreover, when Tays attempted to explain his role and to clarify the ground rules, investigator Dill ignored his plea, reiterated the ground rules, and threatened to cancel the examination and move it to another location. In *Postal Service II*, the examiner listened to the representative and did not interrupt her until the point she was making was understood. This conduct of an interrogation is contrasted with Dill's view that Tays' request to see documents was a "distinct interruption of the interview process" and with Dill's understanding of the limited role Tays played as a witness—he was "just there." Judge's Decision at 4.

In addition, finding a violation in this case is entirely consistent with the Board's holdings in *Texaco*, *Postal Service I*, and *Greyhound*, discussed above. In each of those cases, as here, the Board held that a union

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comments; and the atmosphere was "chilling," "an oppressive environment." (Transcript of hearing at 26-27).

representative was illegally relegated to the role of a silent or passive observer or witness.

B. *NASA's OIG Investigator is a "Representative of the Agency" Under Section 7114(a) (2)(B)*

1. *Case Law Interpreting "Representative of the Agency"*

The Authority has long held that an OIG investigator can, under certain circumstances, be a "representative of the agency" within the meaning of section 7114(a)(2)(B) of the Statute. *Department of Defense, Defense Criminal Investigative Service; Defense Logistics Agency and Defense Contract Administration Services Region, New York*, 28 FLRA 1145 (1987) (*DOD, DCIS*), *enforced sub nom. Defense Criminal Investigative Service, Department of Defense v. FLRA*, 855 F.2d 93 (3d Cir. 1988) (*DCIS*). In *DOJ*, 39 F.3d at 365-68, however, the D.C. Circuit squarely rejected the Authority's interpretation of this statutory language as well as the Third Circuit's rationale in affirming the Authority's decision in this regard. Given the irreconcilable ultimate conclusions reached by these two United States Courts of Appeals, we have carefully considered the facts and reasoning in both decisions.

As relevant here, the facts in *DCIS* and *DOJ* were in all material respects analogous to the scenario presented in the case currently before us. Both *DCIS* and *DOJ* involved interviews of bargaining unit employees who worked for a subcomponent of the agency. In both cases, the employees requested representation by their exclusive representative and in each instance the representative was the exclusive representative of employees within the agency's subcomponent. In each instance, the investigator con-

ducting the respective interviews represented the parent agency's separate investigative component in its office of inspector general. In both cases the respondents claimed that the investigators were not representatives of the agency within the meaning of the Statute. The Authority rejected these arguments, finding in both cases that the agencies' inspector general subcomponents had violated section 7114(a)(2)(B). Both agencies appealed the Authority's decision.

In *DCIS*, the agency argued to the Third Circuit that the "agency" referred to in the Statute is the governmental entity with which the union has a collective bargaining agreement. The court responded that it "would have some difficulty understanding an interpretation limiting 'agency' to the subdivision comprising the collective bargaining unit and excluding 'representatives' of management that are employed in the higher echelons . . . ." *DCIS*, 855 F.2d at 99. The agency also argued that its agent did not conduct the interviews as a "representative of the agency"—the DOD—for purposes of section 7114(a)(2)(B), because it is independent of the DOD. The court rejected this argument, stating that in the context of the objective underlying section 7114(a)(2)(B), "the degree of supervision exercised by DOD management over the affairs of the DOD-OIG is simply irrelevant." *Id.* at 100.

The D.C. Circuit also addressed whether the investigator in *DOJ* was acting as a "representative of the agency" under the Statute, and concluded he was not. The court examined the introductory phrase under section 7114(a)(2)—"An exclusive representative of an appropriate unit in an agency"—and concluded that the OIG, despite qualifying as a statutory agency, "could not have been the 'agency' section 7114(a)(2)(B)

contemplates." *DOJ*, 39 F.3d at 365. The court reached this conclusion because "[t]he union here was not . . . the 'exclusive representative of an appropriate unit in the agency,' that is, in the Office of [the] Inspector General." *Id.* (footnote omitted).

Both courts examined provisions of the Inspector General Act (IG Act). In *DCIS*, the agency argued that section 3(a) of the IG Act[20] was intended to prevent other agency programmatic concerns, such as Federal labor relations matters, from interfering with the IG's statutory functions. The court rejected the DCIS' argument and instead found the purpose of the IG Act was to insulate the IGs from pressure from agency management. *DCIS*, 855 F.2d at 98. The *DCIS* court refused to hold that in enacting the IG Act, Congress intended to repeal section 7114(a)(2)(B) of the Statute. *Id.* at 100.

On the other hand, in DOJ, the D.C. Circuit considered several provisions of the IG Act aimed at maintaining an independence from the parent agency or subcomponent thereof to be audited.[21] The court found

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[20] Each Inspector General shall report to and be under the general supervision of the head of the establishment involved or, to the extent such authority is delegated, the officer next in rank below such head, but shall not report to, or be subject to supervision by, any other officer of such establishment. Neither the head of the establishment nor the officer next in rank below such head shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation.

5 U.S.C. app. § 3(a).

[21] In explaining its opposition to the Third Circuit's reasoning in *DCIS*, the D.C. Circuit relied upon, and quoted extensively from, *United States Nuclear Regulatory Commission*,

that neither the Third Circuit in DCIS, nor the Authority, had considered these provisions in finding violations of the Statute. The D.C. Circuit concluded, contrary to the Third Circuit and the Authority, that the IG's independence would be jeopardized "if another agency of government—the Federal Labor Relations Authority—influenced the Inspector General's performance of his duties on the basis of its view of what constitutes an unfair labor practice." *DOJ*, 39 F.3d at 367.

2. *Application of Relevant Statutory Provisions and Case Law*

Consistent with our decision in *DOD, DCIS*, and the Third Circuit's affirmance of this decision in *DCIS*, we find that investigator Dill was acting as a "representative of the agency"—NASA, HQ—within the meaning of section 7114(a)(2)(B). We reach this conclusion based upon our determination that: (1) the term "representative of the agency" under section 7114(a)(2)(B) should not be so narrowly construed as to exclude management personnel employed in other subcomponents

Washington, D.C. v. FLRA, 25 F.3d 229 (4th Cir. 1994) (*NRC*). However, it cannot be concluded from the NRC decision that the United States Court of Appeals for the Fourth Circuit would agree with the D.C. Circuit's decision in *DOJ*. Unlike *DOJ*, and unlike the present case and *DCIS*, which all arose in the context of an unfair labor practice complaint, *NRC* arose in the context of a negotiability dispute. In a 2-1 decision, the Fourth Circuit reversed the Authority's upholding of the negotiability of several proposals involving investigative interviews. Although the Fourth Circuit disagreed with the Authority's negotiability determination, the *NRC* panel majority recognized that *DCIS* was distinguishable in that it arose in the context of an unfair labor practice complaint. *Id.* at 235. More importantly, the *NRC* majority neither criticized, nor viewed its decision as inconsistent with, *DCIS*. *See id.*

of the agency; (2) the statutory independence of agency OIGs is not determinative of whether the investigatory interviews implicate section 7114(a)(2)(B) rights; and (3) section 7114(a)(2)(B) and the IG Act are not irreconcilable. *See DCIS*, 855 F.2d at 99, 100. These determinations will be addressed in turn.

a. *Section 7114(a)(2)(B) Covers the Actions of Management Personnel Employed in Other Subcomponents of the "Agency"*

In enacting section 7114(a)(2)(B), Congress provided Federal employees and their exclusive representatives with certain representational rights during an interview of a bargaining unit employee. There is no basis in the Statute or its legislative history to make the existence of these statutory rights dependent upon the organizational entity within the agency to whom the person conducting the examination reports.[22] As explained above, Congress intended that Federal employees have the same rights as their counterparts in the private sector—the assistance of a union representative when they are called upon to provide information that exposes them to the risk of disciplinary action. *See Legislative History*, at 926. There is no dispute that the NASA, OIG investigator, although employed in a separate component from the MSFC, is an employee of and ultimately reports to the head of NASA. As discussed below (paragraph c.(2)), NASA, OIG not only provides investigatory information to NASA, HQ but also to other NASA subcomponent offices. It is equally clear

[22] If such were the case, agencies could abridge bargaining unit rights and evade statutory responsibilities under section 7114(a)(2)(B), and thus thwart the intent of Congress, by utilizing personnel from other subcomponents (such as the OIG) to conduct investigative interviews of bargaining unit employees.

and unchallenged that NASA is an "agency" under 5 U.S.C. § 7103(a)(3). As the Third Circuit stated: "We doubt that Congress intended that union representation be denied to the employee solely because the management representative is employed outside the bargaining unit." *DCIS*, 855 F.2d at 99.

b. *Statutory Independence of IGs Is Not Controlling*

To be sure, the IG Act grants an IG a degree of freedom and independence from the parent agency that employs him or her. However, this statutory recognition of autonomy is not absolute, and becomes nonexistent when the IG's purpose in "conducting interviews . . . is to solicit information concerning possible misconduct of [agency] employees in connection with their work," and "the information secured may be disseminated to supervisors in affected subdivisions of the [agency] to be utilized by those supervisors for [agency] purposes." *DCIS*, 855 F.2d at 100.

As is evident from the facts in this case, in some circumstances, NASA, OIG performs an investigatory role for NASA, HQ and its subcomponents, specifically MSFC. The information obtained during the course of an OIG investigatory examination may be released to, and used by, other subcomponents of NASA to support administrative or disciplinary actions taken against unit employees. Contrary to the D.C. Circuit's determination that "[t]he Inspector General does not stand in the shoes of management," *DOJ*, 39 F.3d at 368, under these circumstances we conclude, in agreement with the Third Circuit, that "Congress would regard

[an OIG] investigator as a 'representative of the [agency].'" *DCIS*, 855 F.2d at 100.[23]

c. *The Requirements of Section 7114(a)(2)(B) and the IG Act Do Not Conflict*

We conclude that the requirements of section 7114(a)(2)(B) do not conflict with the IG Act. In reaching this conclusion, we have examined the language of both statutes and their legislative histories and considered the interrelationship between these two enactments.

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[23] The D.C. Circuit noted that in an agency such as the Department of Justice, it saw no distinction between investigative interviews being conducted by an OIG employee and, for example, an FBI agent. The court found that under the Authority's logic both would be "representatives of the agency" and thus obliged to comply with 5 U.S.C. § 7114(a)(2)(B). Finding it "impossible to believe" that questioning by an FBI agent could be constrained by the Statute, the court rejected the Authority's holding. *DOJ*, 39 F.3d at 366. We note that in its hypothetical, the D.C. Circuit did not consider the FBI's statutory authority to "investigate any violation of title 18 involving Government officers and employees—(1) *notwithstanding any other provision of law.*" 28 U.S.C. § 535(a) (emphasis added).

Although the situation envisioned by the D.C. Circuit is not present in the case before us, a cautionary note is appropriate. Our decision herein should not be construed as suggesting that we would conclude in all circumstances that every employee of each subcomponent of agencies having government-wide, law-enforcement responsibilities, such as the Department of Justice, is a "representative of the agency" for the purposes of section 7114(a)(2)(B). Such cases might well be distinguished in light of statutory responsibilities extending outside of the parent agency, as contrasted with the OIG's jurisdiction and its actions in this case, which are focused on internal agency matters.

(1) *Statutory Language*

An examination of the individual provisions of the IG Act reveals no inconsistency with the Statute in general, or section 7114(a)(2)(B) in particular. *See* IV.B.2., above. As noted earlier, the IG enjoys a degree of independence from the parent agency; however, the text of the IG Act establishes that the IG plays an integral role in assisting the agency and its subcomponent offices in meeting the agency's objectives. Under section 2(1) of the IG Act, the investigations and audits that the agency's IG is authorized to conduct and supervise are focused entirely on the agency's programs and operations. 5 U.S.C. app. § 2(1). Section 2(2) of the IG Act sets forth the IG's leadership role in promoting "the economy, efficiency and effectiveness" of, and in preventing fraud and abuse in, the agency's programs and operations. 5 U.S.C. app. § 2(2). Section 2(3) expands upon this theme, enabling the head of the agency—through the IG—to be "fully and currently informed about agency problems and deficiencies, and the necessity for and progress of corrective action by the agency." 5 U.S.C. app. § 2(3). Plainly, the IG represents and safeguards the entire agency's interests when it investigates the actions of the agency's employees. Such activities support, rather than threaten, broader agency interests and make the IG a participant, with other agency components, in meeting various statutory obligations, including the agency's labor relations obligations under the Statute.

(2) *Legislative History*

We have already noted that the expressed legislative intent in enacting section 7114(a)(2)(B) was to provide rights to Federal sector bargaining unit employees

consistent with those provided in the private sector under *Weingarten*. *See* IV.A.1., above. We agree with the Third Circuit that the purpose of the IG Act is "to insulate Inspector Generals [sic] from pressure *from agency management* which might attempt to cover up its own fraud, waste, ineffectiveness, or abuse." *DCIS*, 855 F.2d at 98 (emphasis added). We find that this conclusion is entirely consistent with the statement of purpose in the legislative history of the IG Act: "The purpose of this legislation is to create Offices . . . to more effectively combat fraud, abuse, waste and mismanagement in agency programs and operations." S. Rep. No. 1071, 95th Cong., 2d Sess. 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2676. Thus, we agree with the Third Circuit's rejection of the argument that the IG Act was "intended to create 'an independent investigatory office at the [agency] which would not be subject to interference by any other agency programmatic concerns, including federal labor relations.'" *DCIS*, 855 F.2d at 98. This broad reading is "unsupported by the text and legislative history of the IG Act." *Id.*

(3) *Interrelationship Between Section 7114(a)(2)(B) and the IG Act*

The D.C. Circuit concluded in *DOJ* that if required to comply with 5 U.S.C. § 7114(a)(2)(B), "the Inspector General's independence and authority would necessarily be compromised." *DOJ*, 39 F.3d at 361. With all due respect, we disagree. Our examination of the IG Act does not reveal any irreconcilable conflict with section 7114(a)(2)(B) of the Statute. In particular, no provision in the IG Act cited by the D.C. Circuit as support for its finding of an incompatibility between the IG Act and the Statute, *DOJ*, 39 F.3d at 367, would be rendered ineffective by the right to have a union

representative present during an OIG investigative interview. For example, compliance with the Statute does not prevent an agency IG from "conduct[ing] audits and civil and criminal investigations relating to the Department's operations. 5 U.S.C. app. § 4(a)(1)." *Id.* Nor does compliance with the Statute preclude an IG from "notify[ing] the Attorney General directly, without notice to other agency officials, upon discovery of 'reasonable grounds to believe there has been a violation of Federal criminal law' [5 U.S.C. app. § 4(d)]." *Id.* Rather than hindering such investigations, we find that providing section 7114(a)(2)(B) rights to Federal bargaining unit employees will serve in this context as well the salutary purposes the Supreme Court envisioned in its *Weingarten* decision, *e.g.*, clarifying issues or facts, raising extenuating factors, suggesting other employees having knowledge, and protecting the interests of the entire bargaining unit. *Weingarten*, 420 U.S. at 260-61.

Moreover, as we have held, and as the Third Circuit noted in *DCIS*, 855 F.2d at 100-01, the representational function of a *Weingarten* representative is limited. Among other things, the employer may insist on hearing the employee's own account of the matter under investigation and the union's presence need not transform the examination into an adversary proceeding. *Id.* (relying upon *Weingarten*, 420 U.S. at 260, 262-63); *see also Norfolk Naval Shipyard*, 9 FLRA 458 (1982) (agency management may have need, under certain circumstances, to place reasonable restrictions on the exclusive representative's participation at a section 7114(a)(2)(B) examination). "Given the limited function of a *Weingarten* representative, it is conceivable to us that Congress might conclude that the

employee's interest in representation outweighs the limited interference that his or her representative's presence might occasion in [IG] interviews." *DCIS*, 855 F.2d at 101.

In sum, we agree with the Third Circuit and "do not find section 7114 (a)(2)(B) and the mandate of the [IG] so clearly irreconcilable that we are willing to imply an exception based solely on the enactment of the IG Act." *Id.* at 100.

Even if we were to find a conflict between these two statutes, given the absence of statutory language evidencing a legislative intent that one is preemptive of the other,[24] we find no support for the D.C. Circuit's determination that the IG Act should trump the Statute in general, or section 7114(a)(2)(B) in particular. Resolving such an inconsistency "is a legislative decision . . . and nothing in the IG Act or its legislative history persuades us that Congress considered and resolved [this inconsistency] against federal employees when it passed [the IG] Act." *Id.* at 101. Should Congress disagree with our conclusion, it can amend the laws in accordance with its policy objectives.[25] *See id.*

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[24] *See, e.g.*, 32 U.S.C. § 709(e): "Notwithstanding any other provision of law . . ." which was interpreted as exempting National Guard Technicians from certain provisions of the Statute. *New Jersey Air National Guard v. FLRA*, 677 F.2d 276, 283 (3d Cir. 1982) *cert. denied sub nom., American Federation of Government Employees, AFL-CIO, Local 3486 v. New Jersey Air National Guard, 177 Fighter Interception Group*, 459 U.S. 988 (1982). *Compare* 28 U.S.C. § 535(a) which governs the FBI's statutory authority, discussed in note 13, above.

[25] Further, section 5 of the IG Act, 5 U.S.C. app. § 5(a)(1), which requires an agency IG to report semiannually to Congress on, among other things, "significant problems . . . relating to the administration of programs and operations . . . ," provides an

Our reading of the Statute and the IG Act is consistent with the canons of statutory construction because it gives effect to each law while preserving their sense and purpose. *See, e.g., Morton, Secretary of the Interior v. Mancari*, 417 U.S. 535, 551 (1974); *NRC*, 25 F.3d at 237 (Murnaghan, J., dissenting) ("Neither the Inspector General Act nor the [Statute] . . . is deserving of more or less statutory dignity than the other."). We are unwilling, as is the Third Circuit, "to find a partial, implied repeal of section 7114(a)(2)(B) based solely on Congress' decision in 1978 to authorize the creation of inspector general offices in a number of federal agencies." *DCIS*, 855 F.2d at 100.

C. *NASA, OIG and NASA, HQ Have Violated the Statute*

1. *NASA, OIG*

By the conduct of investigator Dill, NASA, OIG violated section 7114(a)(2)(B) of the Statute and thus committed unfair labor practices in violation of section 7116(a)(1) and (8) of the Statute. The Authority has long held that "when a component of an agency engages in conduct which unlawfully interferes with the protected rights of employees of another component, a violation of section 7116(a)(1) of the Statute will be found to have occurred." *Headquarters, Defense Logistics Agency, Washington, D.C.*, 22 FLRA 875, 884 (1986) (*DLA*).[26] Here, we conclude that the conduct of

agency IG with a mechanism to communicate directly with Congress should compliance with section 7114(a)(2)(B) of the Statute present an agency OIG with "significant problems."

[26] This concept has its genesis in the private sector. *See Austin Co.*, 101 NLRB 1257, 1258-59 (1952). There, a violation was found even though Austin was not the employer of the employees

the NASA, OIG investigator interfered with the rights of the unit employees at MSFC, another subcomponent of NASA.[27] Accordingly, having found earlier herein that NASA, OIG is a representative of the agency, we find that NASA, OIG has violated the Statute.

2. *NASA, HQ*

We also find, contrary to the Judge, that NASA, HQ violated section 7114(a)(2)(B) of the Statute and thus committed unfair labor practices in violation of section 7116(a)(1) and (8) of the Statute.[28] In this regard, we

whose rights were violated. The Board premised liability on a finding that an "intimate business character" existed between Austin and the employer of the employees and that they shared a "community of interests." *See also Hudgens v. NLRB*, 424 U.S. 507, 510 n.3 (1976) (citing *Austin Co.* approvingly). For the reasons discussed above, we find that such a relationship is shared by NASA, OIG, NASA, HQ, and the MSFC.

[27] In reaching this conclusion, and as discussed above in section IV.B.1., we note that the D.C. Circuit rejected, in a similar scenario, a finding of a violation against the OIG because the union in that case was not the exclusive representative of the Office of the Inspector General. *DOJ*, 39 F.3d at 365. Although the court's point is indisputable, it is not determinative of whether the Statute has been violated. *DLA*, 22 FLRA at 884.

[28] There were no exceptions filed with respect to the Judge's recommended dismissal of the complaint as to NASA, HQ. However, NASA, HQ is a party pursuant to 5 CFR § 2421.11 and the Authority has previously addressed, *sua sponte*, matters that were not excepted to by the parties. *See, e.g., United States Immigration and Naturalization Service, United States Border Patrol, San Diego Sector, San Diego, California*, 43 FLRA 642, 654 (1991) (even though no exceptions were filed, because ALJ applied incorrect standard, Authority independently examined negotiability of proposal, applying the correct standard), *enforced sub nom. United States Immigration and Naturalization Service, United States Border Patrol v. FLRA*, 12 F.3d 882 (9th Cir. 1994).

have discussed the investigative role that OIGs perform for the agency. Investigative information is shared with the agency head and other subcomponents of the agency and is a basis upon which disciplinary action is taken. Thus, the OIG represents not only the interests of the OIG, but ultimately NASA, HQ and its subcomponent offices.

Moreover, the IG Act specifically provides that IGs report to and are under the supervision of the head of the agency. 5 U.S.C. app. § 3(a). *See* II.A., above. Accordingly, NASA, HQ is responsible for the statutory violations committed by its OIG in this case.

In reaching this conclusion, we recognize that although the MSFC has a collective bargaining relationship with Local 3434, NASA, HQ does not. However, this does not preclude a finding of a statutory violation against NASA, HQ. The *DLA* rationale, holding one subcomponent of an agency responsible for actions which affect another subcomponent, *DLA*, 22 FLRA at 884, has been applied to the parent agency's actions involving a subcomponent. *See, e.g., U.S. Department of Veterans Affairs, Washington, D.C.*, 48 FLRA 991, 1000-01 (1993); *Headquarters, U.S. Air Force, Washington, D.C. and 375th Combat Support Group, Scott Air Force Base, Illinois*, 44 FLRA 117, 125 (1992), *rev. denied sub nom. Headquarters, U.S. Air Force, Washington, D.C. v. FLRA*, 10 F.3d 13 (D.C. Cir. 1993) (without opinion). NASA, HQ's failure to ensure that its IG comply with the Statute justifies a finding of a statutory violation.

We conclude that holding NASA, HQ responsible for the manner in which its OIG conducts investigative interviews pursuant to section 7114(a)(2)(B) fully effectuates the purposes of the Statute. In reaching

this conclusion, we recognize that the Authority has, in similar circumstances, previously declined to hold an agency headquarters responsible for the actions of its IG. *U.S. Department of Justice, Washington, D.C. and U.S. Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota and Office of Professional Responsibility, Washington, D.C. and National Border Control Council, American Federation of Government Employees*, 46 FLRA 1526, 1571 (1993) *rev'd sub nom. But cf. U.S. Department of Labor, Mine Safety and Health Administration*, 35 FLRA 790 (1990) (holding the Mine Safety and Health Administration liable for the illegal actions of the Department's IG in a case where the Inspector General was not charged).

However, the Authority also has noted in prior decisions that it is appropriate for agency headquarters with administrative responsibility for the Office of Inspector General to advise IGs "of the pertinent rights and obligations established by Congress in enacting the Federal Service Labor-Management Relations Statute. More particularly, . . . investigators should be advised that they may not engage in conduct which interferes with the rights of employees under the Statute." *DOD, DCIS*, 28 FLRA at 1151. It is with this objective in mind—ensuring that the Office of Inspector General is advised by its statutory superior of the obligation to comply with the Statute—that we find the purposes underlying the Statute will be effectuated by holding NASA, HQ liable for the actions of its Inspector General. As set forth in this decision, despite a degree of independence, the IG is nevertheless under the direct supervision of the head of the agency. Accordingly, we will no longer follow Authority precedent

declining to hold an agency headquarters responsible for the statutory violations of its Inspector General.

V. *Order*

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, NASA Headquarters, Washington, D.C., and NASA Office of Inspector General, Washington, D.C., shall:

1. Cease and desist from:

(a) Requiring any bargaining unit employee of Marshall Space Flight Center to take part in an investigatory examination conducted pursuant to section 7114(a)(2)(B) of the Statute without allowing the employee's exclusive representative to actively participate in such examination.[29]

(b) In any like or related manner, interfering with, restraining or coercing Marshall Space Flight

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[29] Consistent with our case law, we have modified the scope of the Judge's recommended Order and Notice to require Respondents: (1) to cease and desist from interfering with the rights of the bargaining unit employees at Marshall Space Flight Center; and (2) to post the corresponding Notice at Marshall Space Flight Center, the only NASA site where bargaining unit employees are located. *See, e.g., Department of Housing and Urban Development, San Francisco, California*, 41 FLRA 480, 482 (1991) (posting of notices required only at sites where bargaining unit employees are located as evidence that their rights guaranteed under the Statute will be enforced).

Further, we are not ordering the reconstruction type of relief the Authority ordered in *Safford*, 35 FLRA at 450, because the record does not establish, nor does the General Counsel contend, that P's removal was connected in any way with the interview that violated the Statute. Judge's Decision at 4.

Center employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) NASA Headquarters shall order the NASA Office of Inspector General to comply with the requirements of section 7114(a)(2)(B) when conducting investigatory examinations of employees pursuant to that section of the Statute.

(b) NASA Headquarters shall post at Marshall Space Flight Center, where bargaining unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the NASA Administrator, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Atlanta Regional Office, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE NOTIFY OUR EMPLOYEES THAT

WE WILL NOT require any bargaining unit employee at the Marshall Space Flight Center to take part in an investigatory examination of a bargaining unit employee conducted pursuant to section 7114(a) (2)(B) of the Federal Service Labor-Management Relations Statute (Statute) without allowing the exclusive representative of such employee to actively participate in the examination.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce Marshall Space Flight Center bargaining unit employees in the exercise of their rights assured them by the Statute.

_____

NASA Headquarters and NASA
Office of Inspector General
Washington, D.C.

Date: _____ By:_____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Atlanta Regional Office, Federal Labor Relations Authority, whose address is 1371 Peachtree Street, NE, Suite 122, Atlanta, GA 30309-3102, and whose telephone number is: (404) 347-2324.

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

HEADQUARTERS
NATIONAL AERONAUTICS AND SPACE
ADMINISTRATION
WASHINGTON, D.C.
(RESPONDENT)

and

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
OFFICE OF THE INSPECTOR GENERAL
WASHINGTON, D.C.
(RESPONDENT)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 3434
(CHARGING PARTY)

AT-CA-30481

STATEMENT OF SERVICE

I hereby certify that copies of the Decision and Order of the Federal Labor Relations Authority in the subject proceeding have this day been mailed to the following parties:

Barbara Long Union Representative American Federation of Government Employees, Local 3434 Room 150, Bldg. 4471 MSFC, AL 35812	*CERTIFIED MAIL* *RETURN RECEIPT* *REQUESTED*
Elizabeth Richardson Agency Representative Office of Inspector General National Aeronautics and Space Administration Washington, D.C. 20546	*CERTIFIED MAIL* *RETURN RECEIPT* *REQUESTED*
Brent S. Hudspeth Counsel for the General Counsel Federal Labor Relations Authority 1371 Peachtree St., NE., Suite 122 Atlanta, GA 30309-3102	*CERTIFIED MAIL* *RETURN RECEIPT* *REQUESTED*

DATED: July 28, 1995
WASHINGTON, D.C.

/s/ DEBORAH D. JOHNSON
DEBORAH D. JOHNSON
Legal Technician

APPENDIX C

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AT-CA-30481

HEADQUARTERS
NATIONAL AERONAUTICS AND SPACE
ADMINISTRATION
WASHINGTON, D.C.
(RESPONDENT)

and

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
OFFICE OF THE INSPECTOR GENERAL
WASHINGTON, D.C.
(RESPONDENT)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 3434
(CHARGING PARTY/UNION)

CALJ 95-02

DECISION
October 21, 1994

Before: GARVIN LEE OLIVER
Administrative Law Judge

Statement of the Case

The unfair labor practice complaint alleges that Respondents violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116(a)(1) and (8), by failing to comply with the provisions of section 7114(a)(2) (B) of the Statute. Respondents allegedly refused to allow a Charging Party (Union) representative to actively participate in the examination of a bargaining unit employee who reasonably feared discipline and requested the representation of the Union.

Respondent OIG's answer denied any violation of the Statute.

A hearing was held in Decatur, Alabama. Respondent OIG, the Charging Party, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

Respondent National Aeronautics and Space Administration, Washington, D.C. (NASA) is an agency under 5 U.S.C. § 7103(a)(3). The George C. Marshall Space Flight Center, Marshall Space Flight Center, Alabama (MSFC) is a component of NASA, and the Union is the exclusive representative of an appropriate unit of MSFC employees.

Respondent OIG is also a component of NASA. OIG was established by Public Law 95-452, as amended, 5 U.S.C. app. 3, to, among other things, "create independent and objective units—(1) to conduct and supervise audits and investigations relating to the programs and operations" and "(3) to provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies[.]" 5 U.S.C. app. 3 § 2(1) and (3). The Inspector General has the duty and responsibility "to provide policy direction for and to conduct, supervise, and coordinate" investigations. 5 U.S.C. app. 3 § 4(a)(1). The Inspector General reports to and is under the general supervision of the Administrator or NASA, but the Administrator cannot "prevent or prohibit the Inspector General from initiating, carrying out, or completing" any investigation. 5 U.S.C. app. 3 §§ 3(a); Joint Exh. 1.

The OIG maintains offices at all NASA Centers, including MSFC. OIG Agents assigned to the MSFC OIG Center Office are not under the supervision of any MSFC officials. They are subject to the direction of individuals in the OIG chain of command. (TR. 33).

In January 1993 OIG furnished information to MSFC officials indicating that P,[1] an employee of MSFC and a member of the bargaining unit represented by the Union, might pose a serious and immediate threat to his coworkers. P's name was linked with several documents which set forth potential threats and plans

[1] P's name is reflected in the record, but, due to the nature of the allegations against him and the limited relief requested by the General Counsel, it is not deemed necessary to set forth his full name in this decision.

for violence. As a result of this information, MSFC officials placed P on nonduty status with pay, restricted his access to the Center, and ordered him to report for a fitness for duty examination. (G.C. Exh. 2).

OIG Special Agent Larry E. Dill was assigned the investigation to determine whether P was indeed the author of the documents and, if so, whether he intended to carry out the actions set forth in them. The only timely way to resolve the authorship issue was to interview P as soon as possible. Dill contacted P, and P agreed to be interviewed in the office of his attorney, Bo Emerson. P requested that both his attorney and his Union representative be allowed to be present at the interview. Dill agreed. (Tr. 38-39). Respondent OIG admits that it was reasonable for P to believe that the examination could result in disciplinary action. (Tr. 8).

In preparation for the interview, Special Agent Dill prepared an outline. (Respondent Exh. 1). This outline included the following ground rule:

> The union representative, if present, serves as a witness and is not to interrupt the question and answer process. Additionally, the union representative is subject to being called as a witness for the government.

The examination was conducted on January 25, 1993 and attended by Special Agents Dill and David Carson of the OIG Office, P, Union Steward Patrick Tays, and Attorney Bo Emerson. (Tr. 39). Dill read aloud his prepared ground rules, including the above, but leaving out the words "if present." (Tr. 41). Tays objected to this statement and pointed out that he was "there to represent the union's and the bargaining unit's

interests and P's interests." (Tr. 24). Dill listened to Tays' objection, stated that this was indeed a ground rule for the meeting, and read his statement again. (Tr. 24, 42). Tays objected again, arguing that he was not present as a witness and would refuse to be called as a witness. (Tr. 24). Dill said he would cancel the meeting and move it someplace else at a different time if Tays did not "maintain" himself.[2] (Tr. 29).

Early in the interview, Dill asked questions of P and provided P and his attorney, who were seated near Dill, some documents to peruse. After P returned the documents to Dill, Tays, who was seated at the opposite end of the table, requested, in "a somewhat agitated tone of voice," to see the documents. Dill regarded this as "a distinct interruption of the interview process" because he "had completed what [he] wanted to do with those documents with Mr. Emerson and P" and "[i]f Mr. Tays had wanted to see those documents, [he should have] viewed them while Mr. Emerson and P were viewing [them]." Nevertheless, Dill passed the documents to Tays after P "basically stated that it was okay to pass those documents to Mr. Tays." (Tr. 41-44). Thereafter, when Dill passed documents to P, Tays walked over and stood behind P and Emerson to view them. (Tr. 24).

Later on in the interview process, Dill asked P if he felt his coworkers were afraid of him. Tays advised P

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[2] Dill testified that he had no recollection of stating that he "would cancel the interview unless Mr. Tays shut up or left." He acknowledged, "I was at a point in time where that was not prudent to turn around and establish this for another day because we had brought all these folks together, and we needed to press on and get this issued resolved." (Tr. 42). I credit Tays' testimony on this point.

that he didn't think P should answer as he would be giving an opinion and couldn't really answer the question accurately. Dill responded that Tays could not direct P not to answer as he "was just there." When P's attorney spoke up and said that P should not answer the question, Dill said, "Okay, fine," and went on to other questions. (Tr. 25).

Tays testified that the OIG's actions regarding his role in the proceeding affected the way P subsequently reacted to Tay's questions of comments. Fore example, when he advised P to avoid a discussion about fantasies with OIG agents, P ignored him and paid attention only to his attorney of Dill. (Tr. 25-26).

P was ultimately removed from his employment at MSFC. The Union does not know his whereabouts. (Tr. 20, 26).

Conclusions

The General Counsel contends that the examination was by a representative of the Respondent NASA and Respondent OIG and the representative's conduct interfered with the Union's right to be represented and/or would have a reasonable tendency to interfere with the Union's right to be represented. The General Counsel seeks a remedial cease and desist order and a notice to be signed by the Administrator, NASA and Director, OIG and posted at every NASA facility where the Union is the exclusive representative.

Respondent OIG defends on the basis that OIG was faced with a delicate situation and acted reasonably to protect the safety of MSFC employees, P's individual rights, and the Union's representational rights. OIG contends that the ground rules were proper to keep the situation from becoming adversarial and emotionally

charged and did not reasonably tend to intimidate or coerce Mr. Tays. OIG claims that Mr. Dill did nothing during the interview to interfere with Mr. Tays' rights to fully participate as a Union representative. OIG points out that Mr. Dill never asked Tays to leave the room, to shut up or be quiet, and never stopped him from looking at documents, restricted his movements, or threatened him with disciplinary action.

Section 7114(a)(2) provides:

> An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—
>
> . . . .
>
> (B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if —
>
> (1) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
>
> (2) the employee requests representation.

The examination of P was conducted by Special Agent Dill under the direction of Respondent OIG. Thus, he was a "representative of the agency" under section 7114(a)(2)(B). In *Department of Defense, Defense Criminal Investigative Service*, 28 FLRA 1145 (1987), *aff'd sub nom. DCIS v. FLRA*, 855 F.2d 93, 100 (3d Cir. 1988), the court found that the degree of supervision exercised by agency management over investigators is irrelevant when the investigators are employees of the same agency and their purpose when conducting interviews is to solicit information con-

cerning possible misconduct on the part of agency employees in connection with their work. Here the OIG investigator was employed by the same parent agency, NASA, as was P, and was questioning P regarding possible misconduct in connection with his work. The record establishes that the information secured by OIG is referred for administrative or disciplinary action to MSFC, where the employee's collective bargaining unit is located. *See also U.S. Department of Justice, Office of the Inspector General, Washington, D.C.*, 47 FLRA 1254, 1261 (1993) (*Justice, OIG*).

In *United States Department of Justice, Bureau of Prisons, Safford, Arizona*, 35 FLRA 431, 438-40 (1990) the Authority reviewed the provision, purposes, and benefits of section 7114(a)(2)(B), as follows, and held that by directing a union representative to remain silent—"just to be present during this interview"—the agency violated section 7116(a)(1) and (8):

> Section 7114(a)(2)(B) provides that an exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at any examination of an employee in the unit by a representative of the agency in connection with an investigation if the employee reasonably believes that the examination may result in disciplinary action and the employee requests representation. The purpose of section 7114(a)(2)(B) is to create representational rights for Federal employees similar to the rights provided by the National Labor Relations Board (NLRB) in interpreting the National Labor Relations Act (NLRA). *See* 124 Cong. Rec. 29184 (1978), *reprinted in Legislative History of the Federal Service Labor-Management Relations Statute*, H.R. Comm. Print No. 7, 96th

Cong., 1st Sess. 926 (1979) (*Legislative History*), where Congressman Udall explained that the purpose of the House bill provisions which led to enactment of section 7114(a)(2)(B) was to reflect the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) (*Weingarten*).

Under *Weingarten*, the right to representation at an examination is intended to benefit an employee who is called into a meeting with his or her employer in connection with an investigation as well as to benefit the employer and the union. *See* Wireman, *Union Representation at Investigatory Interviews: The Subsequent Development of Weingarten*, 28 Cleveland State L. Rev. 127, 129-31 (1979). In particular, representation at an investigatory interview promotes a more equitable balance of power between labor and management. *See Weingarten*, 420 U.S. at 261-62, where the Court noted that "[r]equiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the [National Labor Relations] Act was designed to eliminate[.]" Such representation also contributes to preventing unjust discipline and unwarranted grievances. In *Weingarten* the Court noted that "[a] single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors." *Id.* at 262-63. In such circumstances, the Court concluded that "[a] knowledgeable union representative could assist the employer by eliciting favorable facts, and save the

employer production time by getting to the bottom of the incident occasioning the interview." *Id.* at 263. In support of its conclusion that representation could be beneficial to the employer as well as the employee, the Court quoted from an arbitrator's award that described the representation process as contemplating "that the steward will exercise his responsibility and authority to discourage grievances where the action on the part of management appears to be justified." *Id.* at 262-63 n.7.

In view of the legislative history underlying section 7114(a)(2)(B), cited above, we conclude that the purposes underlying the *Weingarten* right in the private sector—promoting a more equitable balance of power and preventing unjust disciplinary actions and unwarranted grievances—also apply to the right to representation created by section 7114(a)(2)(B). These purposes are consistent with the overall purposes and policies of the Statute set forth in section 7101. That is, they effectuate "the right of employees to organize, . . . and participate through labor organizations . . . in decisions which affect them . . . [which] safeguards the public interest, . . . contributes to the effective conduct of public business, and . . . facilitates and encourages the amicable settlements of disputes[.]" Insofar as representation at examinations promotes a more equitable balance of power between management and labor, we believe that this is consistent with the intent of Congress in passing the Civil Service Reform Act (CSRA), Pub. L. 95-454, of which the Statute constitutes title VII. *See Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 107 (1983) in which

the Court noted, "[i]n passing the Civil Service Reform Act, Congress unquestionably intended to strengthen the position of federal unions and to make the collective bargaining process a more effective instrument of the public interest[.]"

The purposes underlying section 7114(a)(2)(B) and the benefits intended for the various parties cannot be achieved if the union representative is prohibited from taking an active role in assisting an employee in presenting facts at an examination. Consequently, under section 7114(a)(2)(B) representation includes the right of the Union representative to take an "active part" in the defense of the employee. *Federal Aviation Administration, St. Louis Tower, Bridgeton, Missouri*, 6 FLRA 678, 678-79, n.2 (1981); *NLRB v. Texaco, Inc.*, 659 F.2d 124 (9th Cir. 1981).

In *U.S. Department of Justice, Immigration and Naturalization Service, Border Patrol, El Paso, Texas*, 42 FLRA 834, 840 (1991), the Authority stated, "The Authority has long held that for the right of representation to be meaningful, the representative must have complete freedom to assist, and consult with, the employee," citing *U.S. Customs Service, Region VII, Los Angeles, California*, 5 FLRA 297, 306 (1981) (*Customs*). In *Customs* the Authority found a violation where the representative's active participation was limited to a "practice" interview, he was admonished not to speak out or make statements during the subsequent taped interview, and was only allowed to volunteer additional information at the end of the taped interview.

As Counsel for the General Counsel points out, the Supreme Court in *Weingarten* also noted that the union representative is "safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly." 420 U.S. at 260-61. Based on this proposition, it is now well established that representation by a private attorney does not divest an employee of his right to union representation at the examination. *See, e.g., American Federation of Government Employees, Local 1941 v. FLRA*, 837 F.2d 495, 499 n.5 (D.C. Cir. 1988) ("The union's interest is not vindicated by the presence of counsel for the employee[.]")

The record reflects that Special Agent Dill advised Tays at the outset that he "serves as a witness and is not to interrupt the question and answer process." A common dictionary meaning of "witness" is "One who has seen or heard something," or "One who is called upon to be present at a transaction in order to attest to what takes place." *Webster's II New Riverside University Dictionary*, 1324 (1988). Special Agent Dill's ground rules statement conveyed the clear message that Tays was to be strictly an observer and not one who would take an active part in the proceedings. Special Agent Dill subsequently threatened to cancel the meeting if Tays did not "maintain" himself, and later informed Tays that he was "just there." These actions interfered with the Union representative's ability to take an active part in assisting the employee to elicit and present facts as contemplated by the Statute.

The Supreme Court declared in *Weingarten* that the presence of the Union representative "need not transform the interview into an adversary contest," 420 U.S. at 263, and the Authority has held that a union's representational rights under section 7114(a)(2)(B) may not interfere with an employer's legitimate interest and prerogative in achieving the objective of the examination or compromise the integrity of the employer's investigation. *Federal Aviation Administration, New England Region, Burlington, Massachusetts*, 35 FLRA 645, 652 (1990).

Union representative Tays objected to Dill's description of his role in the proceedings when Dill read and then reread from his ground rules. Tays also raised his voice when he requested to view the documents which had been shown to P and P's attorney. These minor and justifiable reactions did not unduly disrupt or interfere with the objective of the examination and were insufficient to deny Tays his right to take an active role in the examination.

Respondent OIG contends that Mr. Tays was able to fulfill his responsibility to the bargaining unit. The fact that Mr. Tays may have done so is immaterial. An agency can not impose an unduly restrictive limitation on a union representative and later escape responsibility by taking advantage of, or finding fault with, the representative's conduct under the circumstances. *U.S. Department of Justice, Washington, D.C. and U.S. Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota*, 46 FLRA 1526, 1568 (1993) (*INS, Twin Cities*) (*petition for review filed as to other matters sub nom. U.S. Department of Justice, Washington, D.C. and U.S. Immigration and Naturalization Service, Twin Cities, Minnesota, et al. v. FLRA*,

No. 93-1283 (D.C. Cir. Apr. 26, 1993); *Department of the Air Force, Office of Special Investigations, McChord Air Force Base, Tacoma, Washington*, Case No. 9-CA-80368, 87 ALJDR (1990).

By the conduct of Special Agent Dill, described above, Respondent OIG failed to comply with section 7114(a)(2)(B) of the Statute and thereby committed an unfair labor practice in violation of section 7116(a)(1) and (8) of the Statute, as alleged.

There is no evidence in the record that Respondent NASA was responsible for this violation. Therefore, it is recommended that such allegations as to Respondent NASA be dismissed. *Justice, OIG*, 47 FLRA at 1255, 1271; *INS, Twin Cities*, 46 FLRA at 1528, 1569.

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that National Aeronautics and Space Administration, Office of the Inspector General, Washington, DC, shall:

1. Cease and desist from:

(a) Requiring any bargaining unit employee of the National Aeronautics and Space Administration to take part in an examination in connection with an investigation, without allowing the exclusive representative of such employee to actively assist such employee, where representation has been requested by the employee and the employee reasona-

bly believes that the examination may result in disciplinary action against him or her.

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Post at all NASA facilities where bargaining unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Inspector General, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Atlanta Region, 1371 Peachtree Street, NE, Suite 122, Atlanta, GA 30309-3102, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, October 21, 1994

/s/ GARVIN LEE OLIVER
GARVIN LEE OLIVER
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT require any bargaining unit employee of the National Aeronautics and Space Administration to take part in an examination in connection with an investigation without allowing the exclusive representative of such employee to actively assist such employee, where representation has been requested by the employee and the employee reasonably believes that the examination may result in disciplinary action against him or her.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

_____
(Activity)

Date:_____ By:_____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Atlanta Region, 1371 Peachtree Street, NE, Suite 122, Atlanta, GA 30309-3102, and whose telephone number is: (404) 347-2324.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-6630

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER,

v.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,
WASHINGTON, D.C. AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,
OFFICE OF THE INSPECTOR GENERAL,
WASHINGTON, D.C., RESPONDENTS

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, INTERVENOR.

No. 95-6690

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,
WASHINGTON, D.C. AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,
OFFICE OF THE INSPECTOR GENERAL,
WASHINGTON, D.C., PETITIONERS,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
RESPONDENT,

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES,
AFL-CIO, INTERVENOR.

On Petition for Review and Cross-Application for Enforcement of an Order of the Federal Labor Relations Authority

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19__, ____F.2d____).

Before: COX, Circuit Judge, KRAVITCH, Senior Circuit Judge, and STAGG*, Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ E.R. COX
UNITED STATES
CIRCUIT JUDGE

ORD-42
(6/95)

---

* Honorable Tom Stagg, Senior U.S. District Judge for the Western District of Louisiana, sitting by designation.

No. 98-369

In the Supreme Court of the United States

OCTOBER TERM, 1998

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, WASHINGTON, D.C., AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, OFFICE OF THE INSPECTOR GENERAL, PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY, AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL LABOR RELATIONS AUTHORITY

DAVID M. SMITH*
Solicitor

ANN M. BOEHM
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(202) 482-6620

**Counsel of Record*

21pp

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In the Supreme Court of the United States

OCTOBER TERM 1998

No. 98-369

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, WASHINGTON, D.C., AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, OFFICE OF THE INSPECTOR GENERAL, PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY, AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL LABOR RELATIONS AUTHORITY

INTRODUCTION

On August 28, 1998, the National Aeronautics and Space Administration Headquarters (NASA-HQ) and Office of the Inspector General (NASA-OIG) (jointly referred to as "the agency"), petitioned for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit. The opinion of the court of appeals is reported at 120 F.3d 1208.

(Pet. App. 1a-20a.)[1] The decision and order of the Federal Labor Relations Authority (Authority) is reported at 50 FLRA 601. (Pet. App. 21a-57a.)

It is the position of the respondent Authority that the Eleventh Circuit decision is correct and should be affirmed. However, a division among the circuits exists over the resolution of the major issue in this case: the entitlement of an exclusive representative of federal employees to be present when a bargaining unit employee is examined by an Office of the Inspector General (OIG) agent as provided for in 5 U.S.C. 7114(a)(2)(B). This division causes uncertainty for all participants in federal government labor-management relations. Moreover, resolution of the issue is of considerable import because it impacts on this fundamental representational right that Congress provided to federal employees in the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. 7101-7135 (1994 & Supp. II 1996). Accordingly, the Authority does not oppose granting the present petition.

STATEMENT

A. Background - The Federal Service Labor-Management Relations Statute

The Statute governs labor-management relations in the federal service. Under the Statute, the responsibilities of the Authority include adjudicating unfair labor practice complaints, negotiability disputes, bargaining unit and representational election matters,

[1]The court's denial of the agency's petition for rehearing and suggestion of rehearing *en banc* is also appended to the petition. (Pet. App. 75a-76a.)

and resolving exceptions to arbitration awards. *See* 5 U.S.C. 7105(a)(1), (2); *see also Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 93 (1983) (*BATF*). The Authority thus ensures compliance with the statutory rights and obligations of federal employees, labor organizations that represent such federal employees, and federal agencies. The Authority is further empowered to take such actions as are necessary and appropriate to effectively administer the Statute's provisions. *See* 5 U.S.C. 7105(a)(2)(I); *BATF*, 464 U.S. at 92-93.

The Authority performs a role analogous to that of the National Labor Relations Board (NLRB) in the private sector. *See BATF*, 464 U.S. at 92-93; *Federal/Postal/Retiree Coalition* v. *Devine*, 751 F.2d 1424, 1430 (D.C. Cir. 1985). Congress intended the Authority, like the NLRB, "to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the [Statute]." *BATF*, 464 U.S. at 97.

The Statute makes it an unfair labor practice for a federal agency employer to, among other things, "interfere with, restrain, or coerce any employee in the exercise by the employee of any right under [the Statute]," or "otherwise fail or refuse to comply with any provision" of the Statute. 5 U.S.C. 7116(a)(1) and (8). The instant case involves an unfair labor practice under section 7116(a)(1) and (8) and concerns the Authority's interpretation of the representational right set forth in section 7114(a)(2)(B) of the Statute.

Section 7114(a)(2)(B) provides that an exclusive representative "shall be given the opportunity to be represented at any examination of an employee in the unit by a representative of the agency in connection with an investigation" if the employee reasonably

believes that discipline may result from the examination and the employee requests representation. 5 U.S.C. 7114(a)(2)(B). This statutory provision extends to federal employees the right to union representation provided in the private sector by the NLRB through its interpretation of the National Labor Relations Act (NLRA) and the Supreme Court's decision in *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975) (*Weingarten*). *See* 124 Cong. Rec. 29,184 (1978), *reprinted in Subcommittee on Postal Personnel and Modernization of the Committee on Post Office and Civil Service, 96th Cong., 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, at 926 (1979) (*Legis. Hist.*) (Congressman Udall explained that the House bill provisions which led to the enactment of section 7114(a)(2)(B) were intended to reflect the Supreme Court's decision in *Weingarten*); *Internal Revenue Serv., Wash., D.C.* v. *FLRA*, 671 F.2d 560, 563 (D.C. Cir. 1982) (same).

Although representational rights under section 7114(a)(2)(B) and *Weingarten* were intended to be similar, Congress also recognized that the right to representation might evolve differently in the private and federal sectors, and that NLRB decisions would not necessarily be controlling in the federal sector. *See Legis. Hist.* at 824; *U.S. Immigration and Naturalization Serv., N.Y. Dist. Office, N.Y., N.Y.*, 46 FLRA 1210, 1218 (1993), *review denied sub nom. American Fed'n of Gov't Employees* v. *FLRA*, 22 F.3d 1184 (D.C. Cir. 1994). Moreover, in the federal sector the *Weingarten* representation right is expressly codified in the Statute, whereas the same right in the private sector inheres in the employee's guarantee to

id and protection. *See* act in concert for mutual aid a esentation right set *Weingarten*, 420 U.S. at 256, 260. Authority has

In interpreting the statutory represent agent to be a forth in section 7114(a)(2)(B), the Aut 7a, 40a.) As established that it considers an OIG agent rly seeks "representative of the agency." (Pet. App. 37a, 40 OIG such, when a bargaining unit employee properly s cted and is denied union representation in an OI investigation, the employee's and the union's protected rights under section 7114(a)(2)(B) are violated and an unfair labor practice has occurred. *See id.* at 48a.

B. Proceedings in the Present Case

1. The Authority's Decision

In this unfair labor practice decision and order, the Authority held that the NASA-OIG investigator was a "representative of the agency" within the meaning of section 7114(a)(2)(B) of the Statute. *Id.* at 40a. Therefore, the actions of the NASA-OIG agent during the course of an investigation and examination of a bargaining unit employee violated the employee's and the union's protected rights under section 7114(a)(2)(B) of the Statute.[2] *Id.* at 48a. The Authority then found that both NASA-HQ and NASA-OIG were responsible for NASA-OIG's violation of the Statute. *Id.* at 48a-49a. Accordingly, the Authority issued an appropriate remedial order. *Id.* at 52a-53a.

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[2]The NASA-OIG agent allowed the union representative to be present during the investigation of the bargaining unit employee, but the Authority concluded that because of restrictions placed on the union representative's participation, the conduct of the investigatory interview violated section 7114(a)(2)(B). *Id.* at 46a. In the court below, this finding was not contested by the agency. *Id.* at 6a n.4.

a. The NASA-OIG Agent Acted as a "Representative of the Agency"

The Authority based its finding that the NASA-OIG agent was acting as a "representative of the agency," NASA-HQ, on three fundamental conclusions:

> (1) the term "representative of the agency" under section 7114(a)(2)(B) should not be so narrowly construed as to exclude management personnel employed in other subcomponents of the agency; (2) the statutory independence of agency OIGs is not determinative of whether the investigatory interviews implicate section 7114(a)(2)(B) rights; and (3) section 7114(a)(2)(B) and the [Inspector General] Act[3] are not irreconcilable.

Id. at 40a-41a. The Authority reached these conclusions after review of the relevant case law, and the statutory language and legislative history of both the Statute and the Inspector General Act.

In reviewing the relevant case law, the Authority first noted its holding in *Department of Defense, Defense Criminal Investigative Service; Defense Logistics Agency and Defense Contract Administration Services Region, New York*, 28 FLRA 1145 (1987) (*DOD, DCIS*), *enforced sub nom. Defense Criminal Investigative Service, Department of Defense* v. *FLRA*, 855 F.2d 93 (3d Cir. 1988) (*DCIS*), and explained that it has long held that an OIG investigator is considered to be a "representative of the agency" within the meaning of section 7114(a)(2)(B). (Pet. App. 37a.) It further explained that although the Third Circuit affirmed this conclusion in *DCIS*, the D.C. Circuit rejected the

[3]The statutory scheme governing OIGs is set forth in the Inspector General Act of 1978, 5 U.S.C. App. 3 §§ 1-12 (1994 & Supp. II 1996) (Inspector General Act).

Authority's interpretation of section 7114(a)(2)(B) as it pertained to an OIG representative in *United States Department of Justice* v. *FLRA*, 39 F.3d 361 (D.C. Cir. 1994) (*DOJ*). (Pet. App. 37a.)

The Authority carefully reviewed the facts and findings of both *DCIS* and *DOJ*, to include both courts' analyses of the statutory language of section 7114(a)(2)(B) as well as the language and legislative history of the Inspector General Act. (Pet. App. 37a-40a.) After its review of the two cases, the Authority reaffirmed its holding in *DOD, DCIS* and agreed with the Third Circuit's *DCIS* reasoning by concluding that the NASA-OIG investigator was acting as a "representative of the agency" under section 7114(a)(2)(B). (Pet. App. 40a-41a.)

In analyzing the instant case, the Authority first considered which management personnel are obligated to recognize the section 7114(a)(2)(B) representational right, and concluded, consistent with *DCIS*, that the statutory right is not "dependent upon the organizational entity within the agency to whom the person conducting the examination reports." *Id.* at 41a. In other words, the term "representative of the agency" should not be so narrowly construed as to exclude management personnel employed in different components of the agency, such as the OIG.[4] *Id.* at 41a-42a. As it cautioned, "[i]f such were the case, agencies could abridge bargaining unit rights and evade statutory responsibilities under section 7114(a)(2)(B), and thus thwart the intent of Congress, by utilizing personnel from other subcomponents (such as the OIG)

[4]The Authority observed that it is "clear and unchallenged that NASA is an 'agency' under 5 U.S.C. § 7103(a)(3)." *Id.* at 42a.

to conduct investigative interviews of bargaining unit employees." *Id.* at 41a n.22.

Next, the Authority analyzed the statutory independence of the OIG, pursuant to the Inspector General Act, and concluded that this independence does not necessarily exempt OIG investigatory examinations from the provisions of section 7114(a)(2)(B). *Id.* at 42a. Although the Authority explicitly recognized this statutory independence, it determined that the independence is not absolute—especially when the OIG conducts an interview of an employee and reports the findings to the agency for possible disciplinary action, as in the instant case. *Id.*

The Authority then considered the statutory provisions and legislative histories of section 7114(a)(2)(B) and the Inspector General Act and concluded that the two are not incompatible. *Id.* at 43a. First, the statutory language of the two provisions revealed no inconsistencies. *Id.* at 44a. Second, despite the recognized congressional intent that the inspector general be independent from the agency, the Authority found that the purpose of this independence is to insulate the inspector general from agency management pressure—not from compliance with federal labor relations requirements. *Id.* at 45a. Third, based upon the limited representational function of a union representative under section 7114(a)(2)(B), and the benefits to the investigatory process that may result from union involvement, the Authority determined that compliance with section 7114(a)(2)(B) would not place any undue restraint on the conduct of OIG investigative interviews. *Id.* at 46a-47a.

Finally, the Authority noted that even if the two statutes conflicted, it found no congressional intent suggesting that either the Statute or the Inspector

General Act is preemptive of the other. *Id.* at 47a. Thus, the Authority concluded that the Inspector General Act should not trump the Statute. *Id.* at 48a.

b. NASA-OIG Committed an Unfair Labor Practice, for which NASA-HQ Was Equally Responsible

In the final analysis, the Authority held that NASA-OIG failed to comply with section 7114(a)(2)(B) and therefore violated the Statute. *Id.* This finding comports with the Authority's decision in *Headquarters, Defense Logistics Agency, Washington, D.C.*, 22 FLRA 875, 884 (1986) (*DLA*), in which the Authority found that a component of the agency violates the Statute if it engages in behavior that infringes upon the protected rights of employees of another component of the agency.[5] (Pet. App. 48a.) In other words, because the conduct of the NASA-OIG agent, as a "representative of the agency," interfered with the rights of employees in another component of the agency, NASA-OIG violated the Statute. *Id.*

The Authority disagreed, however, with the ALJ's decision to dismiss the complaint against NASA-HQ. *Id.* at 49a. In reviewing the record evidence, the Authority found that NASA-OIG, in its investigative role, represents the interests of NASA-HQ and other NASA-HQ subcomponents. *Id.* at 50a. NASA-OIG shares investigative information with NASA-HQ and NASA-HQ subcomponents, and such information is

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[5]As the Authority explained, "[t]his concept has its genesis in the private sector." (Pet. App. 48a n.26.) Even a non-employer has been sanctioned for violating the rights of bargaining unit employees. *See Hudgens* v. *NLRB*, 424 U.S. 507, 510 n.3 (1976); *Austin Co.*, 101 NLRB 1257, 1258-59 (1952). (Pet. App. 48a-49a n.26.)

used as a basis for disciplinary action. *Id.* In addition, NASA-OIG reports to and is under the supervision of the Administrator of NASA-HQ. *Id.* (citing 5 U.S.C. App. 3 § 3(a)). Based upon these factors, and the Authority precedent applying the *DLA* rationale to the actions of the parent agency and a subcomponent, *see U.S. Dep't of Veterans Affairs, Washington, D.C.*, 48 FLRA 991, 1000-01 (1993), the Authority found NASA-HQ responsible for a statutory violation based upon its failure to ensure that NASA-OIG comply with the Statute. (Pet. App. 50a.)[6]

2. The Court of Appeals' Decision in the Instant Case

The Eleventh Circuit enforced the Authority's unfair labor practice decision and order and denied the agency's petition for review. (Pet. App. 20a). The court agreed with essentially every aspect of the Authority's decision.

Deferring to the Authority's interpretation of the Statute, the court found no error in the Authority's determination that an OIG agent is a "representative of the agency" under section 7114(a)(2)(B). *Id.* at 9a.

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[6]The Authority recognized (Pet. App. 51a.) that in finding the parent agency liable, it was deviating from its holding in the decision underlying the D.C. Circuit's *DOJ* decision, *U.S. Department of Justice, Washington, D.C. and U.S. Department of Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota and Office of Professional Responsibility, Washington, D.C.*, 46 FLRA 1526, 1571 (1993). Based upon its analysis in the instant case, however, the Authority concluded that holding NASA-HQ, as well as NASA-OIG, responsible for the unfair labor practice committed by NASA-OIG would effectuate the purposes of the Statute because it is appropriate for agency headquarters to advise OIG personnel of their responsibilities under the Statute. *Id.* at 50a-51a.

NASA-OIG had argued to the court that the rights and duties set forth in section 7114(a)(2)(B) derive from the collective bargaining relationship, of which the OIG is not a part. *Id.* at 8a-9a. However, the Eleventh Circuit, like the Authority and the Third Circuit, rejected this argument. *Id.* at 9a-11a.

The court found that reading such a requirement into section 7114(a)(2)(B) "would undermine Congress's purpose in enacting this section." *Id.* at 10a. Noting that section 7114(a)(2)(B) "focuses on the risk of adverse employment action to the employee," the court concluded that "[b]ecause the risk does not disappear or diminish significantly when an investigator is employed in an agency component that has no collective bargaining relations with the employee's union, we see no reason why the protection afforded by Congress should be eliminated in such situations." *Id.* Because the Authority had determined that NASA-OIG performs an investigatory role on behalf of NASA-HQ and its components, the court concluded that the NASA-OIG investigator was a "representative of the agency." *Id.* at 11a.

With regard to the Authority's interpretation of the Inspector General Act, the court did not defer to the Authority, *id.* at 5a, but nevertheless agreed with the Authority's conclusions and its reasoning, *id.* at 12a-15a. The court found nothing in the text or legislative history of the Inspector General Act "to justify exempting OIG investigators from compliance with the federal *Weingarten* provision." *Id.* at 12a.

In considering the congressional intent that OIGs be independent from the agencies they investigate, the court found that "the presence of a union representative at OIG interviews, as mandated by federal statute," is not the "type of interference from which Congress

sought to insulate OIG investigators." *Id.* at 14a. The court explained that it did not foresee a union representative hindering an OIG agent's investigative process. *Id.* It thus concluded that compliance with section 7114(a)(2)(B) is not "sufficiently inconsistent with the [Inspector General] Act to justify an implied exemption for OIG investigators." *Id.* at 15a. Without such a conflict, the court could not justify ruling that the Inspector General Act "impliedly" repealed section 7114(a)(2)(B). *Id.* (citing *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974)). Therefore, the court concluded that NASA-OIG committed an unfair labor practice because the NASA-OIG agent was a "representative of the agency" within the meaning of section 7114(a)(2)(B) and the agent's conduct was in violation of the Statute. *Id.*

After finding that NASA-OIG violated the Statute, the court then agreed with the Authority's determination that NASA-HQ, as parent agency for NASA-OIG, was also responsible for the section 7114(a)(2)(B) violation. *Id.* at 19a. The court acknowledged the Authority's holdings finding a parent agency responsible for a statutory violation by a subcomponent of the agency. *Id.* at 18a.

The court analyzed the Authority's finding that, because NASA-HQ "failed to ensure that NASA-OIG complied with § 7114(a)(2)(B)," it was guilty of an unfair labor practice. *Id.* Although the court recognized NASA-OIG's role as an "'independent and objective' unit" of NASA-HQ, pursuant to 5 U.S.C. App. 3 § 2, it also recognized that NASA-OIG "is subject to the general supervision of the agency head." *Id.* at 19a. Moreover, the court highlighted the fact that the NASA-OIG agent "ordered the employee to answer questions or face dismissal," and this suggested that the NASA-OIG agent was acting on behalf of NASA-HQ.

Id. at 19a. The court therefore found no error in the Authority's determination. *Id.*

THE AUTHORITY DOES NOT OPPOSE THE PETITION

The Authority maintains that the decision of the court below is correct and effectively rebuts the arguments raised in the Petition for a Writ of Certiorari. (Pet. 10-25.) The Authority recognizes, however, that the four courts of appeals that have considered the issue of whether an OIG agent is a "representative of the agency" within the meaning of section 7114(a)(2)(B)[7] have reached three different results.[8] Although the Authority disagrees with the agency's arguments regarding the decision below, it agrees that further review by this Court is warranted.

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[7]In addition to the four courts that have directly considered this issue, the agency references the Fourth Circuit's decision in *United States Nuclear Regulatory Commission* v. *FLRA*, 25 F.3d 229 (4th Cir. 1994) (*NRC*), in support of its arguments in favor of Court review of the issue regarding liability of NASA-HQ. *NRC*, which was decided after *DCIS* but before *DOJ*, arose in the context of a negotiability dispute, and not an unfair labor practice like the four other cases. Further, the Fourth Circuit neither criticized nor viewed its decision as inconsistent with *DCIS*. *See NRC*, 25 F.3d at 235. *See also* Pet. App. 13a n.8.

[8]It should be noted that with regard to one aspect of this issue—what constitutes an "agency" within the meaning of 5 U.S.C. 7103(a)(3)—three of the four courts have concluded that this refers to the parent agency. *See FLRA* v. *U.S. Dep't of Justice, Washington, D.C., U.S. Dep't of Justice, Immigration and Naturalization Serv., New York Dist., N.Y., and Dep't of Justice, Office of the Inspector General, Washington, D.C.*, 137 F.3d 683, 688 (2d Cir. 1998) (*DOJ, INS*); Pet. App. 9a; *DCIS*, 855 F.2d at 98. *Cf. DOJ*, 39 F.3d at 365 (OIG qualifies as an "agency").

There are currently three distinct standards among the circuits regarding whether an OIG investigator is a "representative of the agency." The court below (Pet. App. 9a) and the Third Circuit, in *DCIS*, 855 F.2d at 100, both affirmed the Authority's conclusion that an OIG agent is a "representative of the agency." In contrast, the D.C. Circuit in its *DOJ* decision rejected the Authority's holding and concluded that an OIG agent is not a "representative of the agency." 39 F.3d at 368. Finally, the Second Circuit's determination on this issue falls somewhere between *DOJ* and the positions of the Third and Eleventh Circuits. *See DOJ, INS*, 137 F.3d at 690-91. According to the Second Circuit, an OIG agent is not a representative of the agency when the context of the OIG interrogation involves matters within the scope of the Inspector General Act. *Id.* at 686, 690.[9]

This confusion among the circuits creates uncertainty for employees, unions, and agencies regarding the application of this essential, statutory representation

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[9]The *DOJ, INS* case is procedurally unique, and, in the Authority's view, was erroneously decided as a result. The Authority never considered the case underlying the Second Circuit's decision because the agency did not file exceptions to the Administrative Law Judge's (ALJ) decision and order. Pursuant to the Authority's regulations, *see* 5 C.F.R. 2423.29, if no party excepts to an ALJ's decision, the ALJ's decision and order is adopted, without precedential significance, as the Authority's final decision and order. Because the agency did not comply with the order, the Authority sought summary enforcement in the Second Circuit.

As the Authority argued to the Second Circuit, pursuant to the administrative exhaustion requirements of section 7123(c) of the Statute, the court did not have jurisdiction to consider the merits of the case because no exceptions were filed with the Authority. The court, however, found that it had jurisdiction based upon the "extraordinary circumstances" exception to section 7123(c). 137 F.3d at 687-88. The Authority has received an extension of time to file a petition for a writ of certiorari in *DOJ, INS*.

right. As a result, employees and unions involved in OIG investigations are being wrongfully denied this congressionally created representation right, because, as even the agency observed, "the circuit conflict creates uncertainty for OIGs as to which rules apply to which interviews and investigations." (Pet. 23.) The agency's list of pending unfair labor practice cases brought by federal employee unions substantiates this supposition. *Id.* at 22.

Only this Court can authoritatively rectify the circuit split by ruling on this issue. The importance of this issue to federal employees and federal sector labor-management relations militates for granting the petition in this case.

Finally, although there is no current circuit conflict regarding the issue as to whether the parent agency is liable for the unfair labor practice committed by the OIG, the Authority interposes no objection to the Court's consideration of this issue. The liability of the parent agency will continue to arise as an issue if this Court determines that an OIG agent is a "representative of the agency" within the meaning of section 7114(a)(2)(B). Therefore, resolution of the parent agency liability issue will eliminate future litigation in that regard.

Accordingly, the Authority does not oppose granting the present petition.

Respectfully submitted.[10]

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SEPTEMBER 1998

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[10]The Solicitor General authorized the filing of this memorandum and directed the Authority to include the following statement:

I authorize the filing of this memorandum. Seth P. Waxman, Solicitor General.

(3)

No. 98-369

In the Supreme Court of the United States

OCTOBER TERM, 1998

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, WASHINGTON, D.C., AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION OFFICE OF THE INSPECTOR GENERAL, PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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152 pp

QUESTIONS PRESENTED

The Federal Service Labor Management Relations Statute, 5 U.S.C. 7114(a)(2)(B), gives a federal employee the right to the participation of a union representative at an interview by a "representative of the agency" when the employee reasonably believes the interview may result in disciplinary action. The questions presented are:

1. Whether an investigator from the Office of Inspector General (OIG) is a "representative of the agency" within the meaning of that provision, notwithstanding the provisions of the Inspector General Act, 5 U.S.C. App. 3, that insulate the OIG from agency control.

2. Whether, if OIG interviews are governed by 5 U.S.C. 7114(a)(2)(B), an agency headquarters commits an unfair labor practice by failing to require the OIG to comply with 5 U.S.C. 7114(a)(2)(B), notwithstanding the fact that the Inspector General Act deprives an agency head of authority to direct or control the investigations of the OIG.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 120 F.3d 1208. The decision and order (Pet. App. 21a-57a) of the Federal Labor Relations Authority (FLRA) is reported at 50 F.L.R.A. 601.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1997. Pet. App. 1a. A petition for rehearing was denied on March 31, 1998. Pet. App. 76a. On June 22, 1998, Justice Kennedy extended the time for filing a petition for a writ of certiorari to July 29, 1998, and on July 24, 1998, further extended the time for filing to August 28, 1998. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent subchapters of the Federal Service Labor-Management Relations Statute (FSLMRS), enacted as Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*, and in its entirety the Inspector General Act, Pub. L. No. 95-452, 92 Stat. 1101, 5 U.S.C. App. 3,[1] are set forth in the statutory addendum to this brief.

STATEMENT

1. This case involves an alleged unfair labor practice committed when an investigative agent of an Office of Inspector General (OIG) interviewed a unionized federal employee who asserted certain rights created by the statute governing labor-management relations in the federal government. The issues can only be understood in light of the language, history, and purpose of two statutes enacted on consecutive days: the Inspector General Act, Pub. L. No. 95-452, § 1, 92 Stat. 1101 (Oct. 12, 1978), codified at 5 U.S.C. App. 3 § 1 *et seq.*; and the Federal Service Labor-Management Relations Statute (FSLMRS), Pub. L. No. 95-454, §§ 701, 703(a)(2), 92 Stat. 1191, 1217 (Oct. 13, 1978), codified at 5 U.S.C. 7101 *et seq.*

a. The Inspector General Act of 1978 established in each of a number of federal departments and agencies an Office of Inspector General, as an "independent and objective unit[]—(1) to conduct and supervise audits and investigations relating to programs and operations

[1] The Inspector General Act appears in the U.S. Code Annotated as the third numbered Appendix to Title 5, and in the U.S. Code as the second unnumbered Appendix to Title 5. We follow the practice of the parties and the court of appeals in citing the Act as 5 U.S.C. App. 3.

of the above establishments." 5 U.S.C. App. 3 § 2. The original statute created Offices of Inspector General for the Departments of Agriculture, Commerce, Housing and Urban Development, the Interior, Labor, and Transportation, and for the Community Services Administration, the Environmental Protection Agency, the General Services Administration, the National Aeronautics and Space Administration, the Small Business Administration, and the Veterans Administration. See Pub. L. No. 95-452, 92 Stat. 1101. Subsequent enactments established Offices of Inspector General for other departments and agencies. See, *e.g.*, Pub. L. No. 97-113, Tit. VII, § 705(a)(3), 95 Stat. 1544 (Agency for International Development); Pub. L. No. 97-252, Tit. XI, § 1117(b), 96 Stat. 751 (Department of Defense); Pub. L. No. 100-504, Tit. I, § 102(f), 102 Stat. 2517 (Nuclear Regulatory Commission, Department of the Treasury, Department of Justice). Offices of Inspector General created by statute now exist in nearly 60 federal establishments and entities, nearly half of which (27) are led by an Inspector General appointed by the President. See Congressional Research Service, *Statutory Offices of Inspector General: A 20th Anniversary Review* 1 (Apr. 27, 1998); President's Council on Integrity and Efficiency (PCIE) and Executive Council on Integrity and Efficiency (ECIE), *Fiscal Year 1997: A Progress Report to the President* 1 (hereafter PCIE, *Fiscal Year 1997 Report*).[2]

[2] Each of the 14 Cabinet departments has a statutory Inspector General appointed by the President. A number of federal agencies have Inspectors General created by statute and appointed by the head of the agency. For a listing of those OIGs, see Congressional Research Service, *Statutory Offices of Inspector General: Establishment and Evolution* 6 (Apr. 17, 1998).

The Inspector General Act was a response to deficiencies in auditing and investigative procedures within federal agencies, resulting from the control by agency management over the audit and investigation process. Thus, the House Report noted that "when complaints are received, investigators in some agencies are not permitted to initiate investigations without clearance from officials responsible for the programs involved." H.R. Rep. No. 584, 95th Cong., 1st Sess. 5 (1977). Congress received testimony about agency managers who had ordered investigations to be stopped or deprived investigative units of sufficient resources. *Id.* at 5-7.[3] As a result, Congress provided that, while the Inspector General "shall report to and be under the general supervision of the head of the establishment involved," the agency head may not "prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subp[o]ena during the course of any audit or investigation." 5 U.S.C. App. 3 § 3(a). Congress further mandated the separation of investigative from operating responsibilities by providing that "there shall not be transferred to an Inspector General * * * program operating responsibilities." 5 U.S.C. App. 3 § 9(a).

In conducting investigations, OIGs adhere to professional standards and guidelines promulgated by the Department of Justice. PCIE, *Fiscal Year 1997 Report*, *supra*, at 3. OIG investigative agents are trained at the Federal Law Enforcement Training Center (FLETC), where agents of the Secret Service, Bureau of Alcohol, Tobacco and Firearms (BATF), United States Marshals Service (USMS), and other federal law enforcement agency investigators also receive training. See Federal Law Enforcement Training Center, *Catalog of Training Programs Fiscal Year 1995* at 4-5 (1994) (listing participants). As of September 30, 1997, the OIGs led by a presidentially-appointed Inspector General had more than 2,000 criminal investigative agents.[4] Those agents must be skilled in all facets of law enforcement techniques, from using firearms to making arrests. See United States Civil Service Commission, *Grade-Level Guides for Classifying Investigator Positions, GS 1810/1811* at 5-17 (1972). Each Inspector General must "report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law." 5 U.S.C. App. 3 § 4(d). "In FY 1997 alone, OIG investigations led to the recovery of almost $3 billion and the successful prosecution of 15,635, and the suspension or debarment of 6,365 people or businesses doing business with the government." PCIE, *Fiscal Year 1997 Report*, *supra*, at 3.

b. The Federal Service Labor-Management Relations Statute (FSLMRS), 5 U.S.C. 7101 *et seq.*, enacted as Title VII of the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111, established

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[3] See generally Congressional Research Service, *Statutory Offices of Inspector General: A 20th Anniversary Review* 2-7 (Apr. 27, 1998) (describing powers and functions of OIGs); P. Light, *Monitoring Government: Inspectors General and the Search for Accountability* 23-57 (1993) (describing background of Inspector General legislation and history of the concept of Inspectors General).

[4] That number is derived from a survey of OIGs conducted for a General Accounting Office report on Inspectors General scheduled to be issued after the submission of this brief and provided to the Solicitor General by the Vice Chair of the PCIE.

the right of federal employees to organize, select an exclusive representative, and engage in collective bargaining with agency management about a limited number of topics. The FSLMRS was designed to redress a perceived imbalance in the power relationships between an agency's management and its employees. The House report explained that "Title VII of the bill [the FSLMRS] establishes a statutory basis for labor-management relations in the Federal service" in lieu of the Executive Orders that governed those relations. H.R. Rep. No. 1403, 95th Cong., 2d Sess 38 (1978). "Title VII would for the first time enact into law the rights and obligations of the parties to this relationship – employees, agencies, and labor organizations." *Ibid.* In particular, it provides that when a "representative of the agency" examines an employee "in connection with an investigation" and the employee reasonably believes the examination may result in disciplinary action, the employee may upon request have a union representative present. 5 U.S.C. 7114(a)(2)(B).

According to records compiled by the Office of Personnel Management, as of January 1, 1997, the various agencies of the federal government had recognized 1,763 collective bargaining units represented by 91 different unions. See United States Office of Personnel Management, *Union Recognition in the Federal Government* I-5 to I-9 (June 1997). Those various entities had entered into 1,235 collective bargaining agreements. *Id.* at I-5. Although in some Executive departments the number of collective bargaining units recognized is low, such as the Department of Labor (3) and the Department of Education (1), in other departments many more distinct bargaining units have been recognized, such as in the Departments of Agriculture (87), Commerce (48), Health and Human Services (112),

Interior (146), Justice (23), Transportation (90), Treasury (37), and Veterans Affairs (62). *Id.* at I-2 to I-5. As of January 1, 1997, a total of 1,023,852 federal employees were covered by agreements between a union and a federal agency. *Id.* at I-5.

2. The unfair labor practice decision at issue in this case arose out of the investigation of an employee of the National Aeronautics and Space Administration George C. Marshall Space Flight Center (Marshall Center) in Huntsville, Alabama. The material facts are not disputed. See Pet. App. 23a-25a, 59a-63a.

a. In January 1993, NASA-OIG received information from the Federal Bureau of Investigation (FBI) that an employee at the Marshall Center, who throughout this litigation has been referred to as "P" (see Pet. App. 60a n.1), was suspected of authoring various incendiary documents. Pet. App. 23a. The documents had such titles as "Payback List," "Revenge Tactics," "Retribution List," "Goals 1990," and "Goals 1991"; the latter two described aims to seek revenge on enemies within the Marshall Center. See C.A. R.E. 20-22, 43; see also Pet. App. 60a. The documents named Marshall Center employees as potential targets for retribution and contained specific means and methods to get revenge, such as carbon monoxide poisoning, exploding natural gas under a house, making bombs, and injecting enemies with AIDS-infected blood. C.A. R.E. 20-21. Several documents had P's name on them, and a confidential source had identified P as their author. See *id.* at 21, 42. Investigators also received allegations that P had conducted surveillance of the homes of other employees. *Id.* at 43.

b. Upon obtaining that information from the FBI, NASA-OIG assigned the case a high priority and began investigating immediately. Pet. App. 23a-24a, 60a-61a;

C.A. R.E. 21, 42-44. NASA-OIG investigator Larry Dill sought to interview P as soon as possible and contacted him for that purpose. *Ibid.* P stated that he wanted both legal and union representation at the interview, and Dill acceded to both requests. Pet. App. 23a-24a, 61a. Patrick Tays attended the interview as a representative of P's Union, Local 3434 of the American Federation of Government Employees (Local 3434 or Union). Pet. App. 3a, 24a, 61a. At the interview in the office of P's attorney, Dill began by reading prepared "ground rules," which included the following: "The union representative, if present, serves as a witness and is not to interrupt the question and answer process. Additionally, the union representative is subject to being called as a witness for the government." *Id.* at 24a, 61a. The union representative, Patrick Tays, objected to the "ground rules," after which Dill read the statement a second time and stated that he would move the interview somewhere else if Tays did not "maintain himself." *Id.* at 24a, 61a-62a. During the interview, Dill did not initially respond to Tays' request to see a particular document, although apparently Tays was able to see that document (and others) by standing behind P and his attorney. *Id.* at 24a-25a, 61a-62a. Tays later testified that P was affected by Dill's manner toward him (Tays) and that P only paid attention to his attorney and Dill and ignored Tays. *Id.* at 24a-25a, 63a. P was ultimately fired, and his current whereabouts are unknown to petitioners or (apparently) to the Union. *Id.* at 63a.

c. The Union filed charges with the Federal Labor Relations Authority (FLRA) pursuant to 5 U.S.C. 7116(a)(1), alleging that NASA-OIG and NASA Headquarters had committed an unfair labor practice.[5] In particular, the Union charged that NASA-OIG and NASA Headquarters had violated 5 U.S.C. 7114(a)(2)(B), known as the "*Weingarten*" rule, which gives federal employees in a bargaining unit the right to the participation of a union representative at an examination by a "representative of the agency" when the employee reasonably believes the interview may result in disciplinary action and requests representation.[6] The complaint alleged that petitioners violated the rule by refusing to allow the union representative to participate actively in the investigatory interview of P. Pet. App. 22a, 59a. The FLRA General Counsel issued a complaint containing that charge, pursuant to 5 U.S.C. 7118(a).

The OIG responded that it had acted reasonably in light of the "delicate situation" involving the safety of Marshall Center employees and that it had not interfered with Tays' rights to participate fully as a union representative. Pet. App. 63a. The administrative law judge (ALJ) concluded that the OIG investigator was a

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[5] Section 7116(a) provides, in pertinent part:

> For the purpose of this chapter, it shall be an unfair labor practice for an agency —
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter; [or]
>
> * * * * *
>
> (8) to otherwise fail or refuse to comply with any provision of this chapter.

[6] The provision is known as the *Weingarten* rule because it extends to those federal employees covered by the provisions of the FSLMRS the rights established for private sector employees in *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975).

"representative of the agency" for purposes of 5 U.S.C. 7114(a)(2)(B), that the union representative was entitled to participate actively in the interview of P, and that the OIG investigator's actions had interfered with the representative's ability to do so. Pet. App. 64a-71a. The ALJ recommended that the FLRA order NASA-OIG to cease and desist from interfering with *Weingarten* rights and to post at all NASA locations a notice that the NASA-OIG will not interfere with those rights. *Id.* at 71a-73a. Finding no evidence that NASA Headquarters "was responsible for this violation," the ALJ recommended dismissal of the charges against NASA Headquarters. *Id.* at 71a.

NASA-OIG appealed the decision to the FLRA, arguing principally that its investigator was not "a representative of the agency" under the D.C. Circuit's decision in *United States Dep't of Justice* v. *FLRA*, 39 F.3d 361 (1994) (*DOJ*). C.A. R.E. 71-80. The FLRA's General Counsel defended the ALJ's ruling against NASA-OIG, and did not take exception to the ALJ's ruling in favor of NASA Headquarters. See Pet. App. 27a-28a; C.A. R.E. 84-102. On July 28, 1995, the FLRA affirmed the ALJ finding of an unfair labor practice, concluding that Dill's announcement of the "ground rules" violated the statute and that, in conducting the interview, Dill was acting as a "representative" of NASA for purposes of the statutory *Weingarten* rule. Pet. App. 28a-48a. In reaching that conclusion, the FLRA rejected the D.C. Circuit's contrary analysis in *DOJ* and adopted instead the approach set forth in the Third Circuit's earlier decision in *Defense Criminal Investigative Service* v. *FLRA*, 855 F.2d 93 (1988) (*DCIS*). See Pet. App. 37a-40a. The FLRA based that conclusion on two premises: the OIG investigator is an employee of the agency and reports through a chain of

command that leads ultimately to the head of the agency; and the Inspector General provides investigatory information to the head of the agency. The FLRA concluded that the OIG investigator is a representative of agency management even though the Inspector General is largely independent of agency management and even though the OIG investigator is not part of the bargaining unit of the person under investigation. Pet App. 40a-43a. The FLRA reasoned that excluding OIG investigators from the category of "representative[s] of the agency" would open the door to evasion by the agency of its statutory responsibilities, Pet. App. 41 n.22, while in its view including OIG investigators as "representative[s] of the agency" subject to *Weingarten* rights would not in practice interfere with the mission of the OIG. Pet. App. 45a-48a.

In addition, the FLRA reversed the ALJ's ruling with respect to NASA Headquarters, holding that agency headquarters must be held responsible for the actions of NASA-OIG to effectuate the purposes of the statute, even though the FLRA General Counsel had not filed any exceptions to the ALJ's ruling that NASA Headquarters was not responsible for the conduct at issue. *Id.* at 49a-52a. The FLRA therefore ordered NASA Headquarters and NASA-OIG to cease and desist from restricting the participation of union representatives in interviews conducted by NASA-OIG. *Id.* at 52a-53a. The FLRA further directed NASA Headquarters to order NASA-OIG to comply with the requirements of 5 U.S.C. 7114(a)(2)(B) and to post appropriate notices at the Marshall Center. Pet. App. 53a-55a.

3. The FLRA immediately filed an application for enforcement in the Eleventh Circuit. C.A. R.E. 130, 132, 133. Four days after the FLRA's petition was

docketed in that court, NASA-OIG and NASA Headquarters filed a petition for review in the D.C. Circuit. C.A. R.E. 134. Both petitions were filed pursuant to 5 U.S.C. 7123(a), which provides that judicial review of the FLRA's decision or an action for enforcement by the FLRA may be filed "in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia." Pursuant to 28 U.S.C. 2112(a) and Multidistrict Litigation Panel Rule 24, a panel randomly chose the Eleventh Circuit to hear the case.

The Eleventh Circuit granted the FLRA's application for enforcement and denied the petition for review filed by NASA and NASA-OIG. Pet. App. 20a.[7] The court deferred to the FLRA's interpretation of "representative of the agency" in 5 U.S.C. 7114(a)(2)(B), finding no evidence in the Inspector General Act that Congress sought to exempt the OIG from the statutory *Weingarten* rule. In so ruling, in most pertinent respects the court of appeals adopted the analysis of the Third Circuit in *DCIS*, *supra*, and specifically rejected the contrary decision of the D.C. Circuit in *DOJ*, *supra*. Pet. App. 7a-9a, 12a, 15a. The court of appeals also concluded that because OIG investigators conduct investigations and provide information to management that may be used to support administrative or disciplinary actions, the investigators are "representatives of the agency" despite their independence from control by agency management. Pet. App. 11a. The court concluded that subjecting OIG investigators to *Weingarten*

[7] The court of appeals also granted intervenor status to respondent American Federation of Government Employees, AFL-CIO. See Pet. App. 4a.

rights would not impermissibly hinder the OIG's ability to perform its essential function. Pet. App. 14a-15a. The court thus found NASA-OIG guilty of an unfair labor practice in failing to accord the employee his rights under 5 U.S.C. 7114(a)(2)(B). The court also found NASA Headquarters guilty of an unfair labor practice on the theory that it has a supervisory role over the OIG and, therefore, has a duty to ensure that the OIG complies with the *Weingarten* rule.

SUMMARY OF ARGUMENT

I. A. The FSLMRS provides that a federal unionized employee may request and receive representation by a union official at an examination in which the employee reasonably fears discipline if the examination is conducted by "a representative of the agency." 5 U.S.C. 7114(a)(2). The rights created under Section 7114 arise out of the collective bargaining relationship between the employee's union and agency management. As the phrase "representative of the agency" is used in Section 7114 and elsewhere in the FSLMRS, it refers to a representative of agency management, *i.e.*, the entity that has a collective bargaining relationship with the employee's union. See 5 U.S.C. 7103(a)(12) and 7114(a)(2)(A). Limiting the application of Section 7114(a)(2)(B) to the agency management that collectively bargains with the employee's union is consistent with the development of private sector labor law after this Court's decision in *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975), which recognized the right of a union employee to union representation in an investigative interview by management The FLRA's construction erroneously equates any employee of the "agency" with "representative of the agency," ignoring the fact that the phrase "representative of the agency"

is a term of art with a particular meaning in a statute governing labor-management relations.

B. The Inspector General Act insulates the Inspector General from control by agency management in critical respects, so that an Inspector General and OIG investigators are not representatives of agency management. The Inspector General has discretion in what investigations to conduct and how to conduct them; the agency head cannot "prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation." 5 U.S.C. App. 3 § 3(a). The Inspector General also has reporting functions – to Congress and to the Attorney General (when the OIG uncovers evidence of criminal activity) – that distinguish its responsibilities from those of agency management and shield it from political pressure. Although Congress required that an Inspector General be under the "general supervision" of the agency head, that requirement merely facilitates a workable relationship between the agency head and the Inspector General and does not limit the Inspector General's independence in performing the functions prescribed under the Inspector General Act. Congress also prohibited the Inspector General from performing the policy and programmatic functions of agency management and excluded OIGs from the collective bargaining process altogether. To compel OIG investigators to comply with 5 U.S.C. 7114(a)(2)(B) would be inconsistent with the requirements imposed under the Inspector General Act prohibiting OIGs from disclosing certain investigative information and ensuring the OIG's freedom to investigate allegations of misconduct. The FLRA and the court of appeals recognized that the term "representative of the agency" does not include law enforcement officers charged with investigating misconduct by

agency employees for possible criminal prosecution or administrative sanction, but it failed to recognize that under the Inspector General Act OIG investigators are such law enforcement officers, rather than aides of agency management.

C. The FLRA decision is not entitled to deference. First, to the extent it reads 5 U.S.C. 7114(a)(2)(B) to govern interviews by persons other than representatives of agency management, that construction is erroneous in light of the statutory text and the context in which it appears in the statute. Second, the FLRA's application of the statute to OIG investigators depends on an assessment of the relationship between an OIG and agency management, a question as to which the FLRA has no expertise and is entitled to no deference.

D. The court of appeals mistakenly viewed 5 U.S.C. 7114(a)(2)(B) as principally designed to protect federal employees in any investigation that might lead to disciplinary action. In so doing, the court overlooked the fact that the FSLMRS concerns the collective bargaining relationship between agency management and federal employee unions, and not the investigation of employee misconduct by law enforcement agencies like the FBI, which can also result in the imposition of discipline. Because the Inspector General is more like the FBI than an arm of management, OIG investigators are not subject to the requirements of Section 7114(a)(2)(B).

II. If the Court agrees that an OIG investigator is not a "representative of the agency" under 5 U.S.C. 7114(a)(2)(B), it need not decide the second issue presented— whether NASA Headquarters is liable for an unfair labor practice because of the OIG's actions. But even if an OIG investigator were properly regarded as a representative of the agency, it would not

logically follow that an agency headquarters is liable for the investigator's conduct. The provisions of the Inspector General Act establishing the independence of OIGs from agency management deprive agency management of responsibility for any unfair labor practice committed by an OIG.

ARGUMENT

I. AN OIG INVESTIGATOR IS NOT "A REPRESENTATIVE OF THE AGENCY" WITHIN THE MEANING OF 5 U.S.C. 7114(a)(2)(B) AND THUS NEED NOT PERMIT A UNION REPRESENTATIVE TO PARTICIPATE IN AN OIG INVESTIGATIVE INTERVIEW

The FSLMRS provides that "[a]n exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at * * * any examination of an employee in the unit *by a representative of the agency* in connection with an investigation if (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and (ii) the employee requests representation." 5 U.S.C. 7114(a)(2)(B) (emphasis added).

The FLRA and the Eleventh Circuit held in this case that an investigator from NASA's Office of Inspector General is "a representative of the agency" within the meaning of that statute, but in so doing they misunderstood both the purpose of the FSLMRS to regulate relations between employees and management, and the purpose of the Inspector General Act to create investigative offices that are independent of agency management. An examination of the text and purposes of both statutes shows that a "representative of the agency" under the FSLMRS means a representative of agency management, and that an OIG investigator is not such a representative and therefore is not

required to comply with 5 U.S.C. 7114(a)(2)(B) when conducting investigative interviews.

A. A "Representative of the Agency" Within The Meaning Of 5 U.S.C. 7114(a)(2)(B) Is A Representative Of Agency Management That Has A Collective Bargaining Relationship With The Union

1. The *Weingarten* right is contained in 5 U.S.C. 7114, which is entitled "Representation rights and duties." All of the rights and duties in Section 7114 arise out of the collective bargaining relationship between a union and management. Section 7114(a)(2) creates and defines a labor organization's right to "exclusive representati[on]" of the employees in the unit; Section 7114(a)(2)(A) addresses the union's right to participate at a "formal discussion" between management and employees concerning "grievance[s] or * * * personnel polic[ies] or practices or other general condition[s] of employment"; and Sections 7114(a)(4) and 7114(b) address the duty of both agency management and the union to "meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement" covering that agency's employees. Section 7114(a)(2)(B) therefore must likewise be understood as a component of the "[r]epresentation rights and duties," meaning that it, too, is connected to the labor-management collective bargaining relationship. See *INS* v. *National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("the title of a statute or section can aid in resolving an ambiguity in the legislation's text"); see also *Bailey* v. *United States*, 516 U.S. 137, 145 (1995) ("[T]he meaning of statutory language, plain or not, depends on context.") (internal quotation marks and citations omitted).

2. The phrase "representative of the agency" is consistently used in the FSLMRS to describe a representative of management, meaning the entity that has a collective bargaining relationship with a union. Congress used the phrase in three places in the FSLMRS. First, Section 7103(a)(12) defines the term "collective bargaining" as

> the performance of the mutual obligation of *the representative of an agency* and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute * * * a written document incorporating any collective bargaining agreement reached.

5 U.S.C. 7103(a)(12) (emphasis added). Because the term "representative of an agency" is used to define the party to a collective bargaining relationship in Section 7103(a)(12), subsequent uses of the term in the FSLMRS should also be understood as referring to the management entity that has a collective bargaining relationship with a union.[8]

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[8] Section 7103(a)(12) refers to the "representative of *an* agency," while Section 7114(a)(2)(B) refers to the "representative of *the* agency," but that discrepancy results from the fact that the two statutory provisions operate at different moments in time. Prior to the time when an exclusive representative of the employees in a collective bargaining agreement is recognized, management is simply "an agency." After establishing a collective bargaining relationship, management becomes "*the* agency" with respect to the "[r]epresentation rights and duties" (5 U.S.C. 7114) that must be observed between labor and management.

Second, Section 7114(a)(2)(A) (immediately preceding the *Weingarten* right in Section 7114(a)(2)(B)), provides a right of union representation at "any formal discussion between one or more *representatives of the agency* and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment." 5 U.S.C. 7114(a)(2)(A) (emphasis added). Only parties who have a collective bargaining relationship engage in "formal discussion[s]" that pertain to grievances, personnel policies or practices, and conditions of employment. Thus the term "representatives of the agency" in Section 7114(a)(2)(A) clearly refers to the representatives of agency management, *i.e.*, the entity that has a collective bargaining relationship with the union.

The "normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning," *Commissioner* v. *Lundy*, 516 U.S. 235, 250 (1996) (internal quotation marks omitted). Because the term "representative of the agency" is generally used in the statute to contrast the management entity involved in the collective bargaining process with the representative of employees, "representative of the agency" in Section 7114(a)(2)(B) must also refer to a representative of management in the collective-bargaining relationship between an agency and its employees.

3. A construction of Section 7114(a)(2)(B) limiting the statutory *Weingarten* rights to disciplinary interviews conducted by the management entity that has a collective bargaining relationship with the interviewee's union is consistent with the history and purposes underlying the rule. Congressman Udall, whose amendment to H.R. 11280 became the FSLMRS, ex-

plained that the "provisions concerning investigatory interviews reflect the U.S. Supreme Court's holding in *National Labor Relations Board* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975)." 124 Cong. Rec. 29,184 (1978), reprinted in *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978: Subcomm. on Postal Personnel and Modernization of the Comm. on Post Office and Civil Service*, 96th Cong., 1st Sess. 926 (1979) (*Legislative History*).

In *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975), this Court determined that the rule requiring the presence of a union representative at an investigatory interview conducted by management was a permissible construction of the employees' right, under Section 7 of the National Labor Relations Act, "to engage in * * * concerted activities for * * * mutual aid or protection." 29 U.S.C. 157. The Court stated that the rights enumerated in *Weingarten* arose out of the need to balance the power between the parties to the collective bargaining relationship:

> The union representative whose participation [the employee] seeks is, however, safeguarding not only the particular employee's interest, but also the interests of the entire *bargaining unit* by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. The representative's presence is an assurance to other employees in the *bargaining unit* that they, too, can obtain his aid and protection if called upon to attend a like interview. * * * Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided "to redress the perceived imbalance of economic power between labor and management."

420 U.S. at 260-261, 262 (quoting *American Shipbuilding Co.* v. *NLRB*, 380 U.S. 300, 316 (1965)) (footnote omitted) (emphasis added). The D.C. Circuit has emphasized that point: "The Supreme Court in *Weingarten*, and the National Labor Relations Board, viewed the matter [of representational rights] in terms of 'bargaining power.'" *DOJ*, 39 F.3d at 368. "These considerations do not apply to examinations of employees under oath in the course of an Inspector General's investigation" because the OIG's independence means that "the Inspector General cannot side with management, or the union." *Ibid.*

In the private sector, the *Weingarten* right has been strictly confined to apply only when a representative of management interviews a bargaining unit employee and the employee reasonably fears discipline. When management interviews an employee who is *not* in the bargaining unit, the *Weingarten* right does not apply. See, *e.g.*, *E.I. DuPont de Nemours*, 289 N.L.R.B. 627 (1988), review denied per curiam sub nom. *Slaughter* v. *NLRB*, 876 F.2d 11 (3d Cir. 1989). See generally K. Judd, *The* Weingarten *Right in a Nonunion Setting: A Permissible and Desirable Construction of the National Labor Relations Act*, 19 Memphis St. L. Rev. 207, 213-217 (1989) (describing evolution of NLRB rulings culminating in decision that non-unionized employee does not have *Weingarten* rights). Similarly, when an entity other than management, such as a law enforcement officer, interviews a bargaining unit employee who might subsequently face discipline as a

result of information obtained in the interview, the employee has no right to the presence of a union representative.[9] Although Section 7 of the National Labor Relations Act at issue in *Weingarten* is worded differently from 5 U.S.C. 7114(a)(2)(B), nothing in the text or history of the FSLMRS suggests that Congress intended public sector employees to enjoy a right to union representation outside the labor-management relationship recognized in *Weingarten* and its progeny.

4. a. The FLRA's contrary position amounts to a determination that a "representative" of the "agency" must mean any official within the parent agency, because otherwise an agency could avoid its statutory responsibilities by using personnel from a sub-component of the agency other than the employee's to conduct investigative interviews. Pet. App. 41a n.22. But the FLRA's strained construction of the statute is not necessary to prevent evasion, because any person acting at the direction of management and under management's control can be a "representative of the agency" within the meaning of Section 7114(a)(2)(B), without regard to job title. Nonetheless, "representative of the agency" is a term of art. The critical provisions of the FSLMRS, Sections 7103(a)(12) and 7114, are worded in terms of two entities on either side of the bargaining table: the "exclusive representative of employees in an appropriate unit in the agency" that represents labor and the "representative of the agency" that represents management. Thus, there is no support in the text itself for the FLRA's attempt to extend

[9] That proposition appears to be so well understood that it is not even discussed in treatises describing *Weingarten* rights. See, *e.g.*, 3 T. Kheel & M. Eisenstein, *Labor Law* § 10.06 (1998); W. Hartsfield, *Investigating Employee Conduct* § 10.40 (1998).

Weingarten coverage beyond agency management to any official housed within the agency. Nor is there any warrant for extending coverage to the Inspector General to prevent evasion of the rule, since as set forth below, the agency has no power to direct the Inspector General to conduct investigative interviews in aid of management functions.

b. The FLRA's construction leads to what the D.C. Circuit has described as a "semantic difficulty": there is no agency that the OIG investigator can be said to "represent" within the meaning of Section 7114(a)(2)(B). The investigator cannot represent the agency (or component of the agency) that directly employs the person under investigation, because the investigator is not in that entity and the employing agency "could not direct the investigator, and * * * ha[s] no control over him." 39 F.3d at 365. And the OIG itself cannot be the agency contemplated by Section 7114(a)(2)(B) in the phrase "representative of the agency," 39 F.3d at 365, because the "agency" in that phrase must be an entity that contains the employee's bargaining unit. See also pages 31-32, *infra*. The OIG does not in fact contain the bargaining unit to which the employee under investigation belongs, 39 F.3d at 365-366, nor could it do so, because the FSLMRS, 5 U.S.C. 7112(b)(7), expressly "forbids the formation of bargaining units containing employees primarily engaged in investigating other agency employees to ensure they are acting honestly—an apt description of investigators working for the Inspector General." 39 F.3d at 365 n.5 (citing *Nuclear Regulatory Comm'n* v. *FLRA*, 25 F.3d 229, 235 (4th Cir. 1994)).[10]

[10] The Senate bill would have excluded investigative and audit employees from coverage under the FSLMRS only if the agency

c. The FLRA apparently recognizes that law enforcement officers cannot properly be treated as "representative[s] of the agency" that employs them. Thus, it has conceded that FBI agents need not comply with Section 7114(a)(2)(B) when investigating unionized federal employees within the Department of Justice, even though FBI agents themselves are employees of that Department. See FLRA C.A. Br. 39[11]; see also Union-Intervenor C.A. Br. 29, 40. Presumably by the same logic the provision would not apply to other law enforcement officers investigating employees of their parent agency, such as Secret Service agents (employed by the Department of the Treasury) investigating currency counterfeiting by a unionized Treasury employee, or agents of the Bureau of Tobacco, Alcohol and Firearms (also employed by the Department of the Treasury) investigating illegal gun or alcohol trafficking by unionized Treasury employees. Thus, the FLRA's determination that OIG investigators are covered by Section 7114(a)(2)(B) depends on a characterization of

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head determined that exclusion was necessary for the internal security of the agency. *Legislative History*, *supra*, at 563-564 (S. 2640 § 7202(c)). That exclusion, however, which parallels the exclusion of employees of the FBI and CIA, was made nondiscretionary in the version of the statute that was enacted into law. See *id.* at 141-142 (H.R. 13), 258 (H.R. 9094), 399-400 (H.R. 11280), and 972-973 (Udall substitute).

[11] The FLRA explains its decision to exempt FBI agents from the statutory *Weingarten* rule by citing 28 U.S.C. 535(a), which confers authority on the FBI to "investigate any violation of title 18 involving Government officers and employees – (1) notwithstanding any other provision of law." See FLRA C.A. Br. 39. That provision, however, is more naturally read as preserving the concurrent jurisdiction of the FBI to investigate offenses that Congress also charged other law enforcement agencies (such as OIGs) with investigating.

those investigators as more like administrative aides to the agency head than like law enforcement officers. That characterization rests on a fundamental misconception of the nature of a statutory Inspector General, a question governed not by the FSLMRS, which the FLRA is charged with administering, but by the Inspector General Act, to which we now turn.

B. The Inspector General Act Establishes That An Inspector General Is Not A Representative Of Agency Management Within The Meaning Of 5 U.S.C. 7114(a)(2)(B)

1. The Inspector General Act makes an OIG independent of agency management

As a general matter, the OIG's grant of statutory authority is entirely different from and independent of the grant of authority to the head of the agency. Compare 5 U.S.C. App. 3 § 9(a)(1)(P) (creating the Office of Inspector General of NASA) with 42 U.S.C. 2472 (creating NASA).[12] The Inspector General Act provides that the Inspector General for each department shall lead an "independent and objective unit[]," 5 U.S.C. App. 3 § 2, and be "appointed by the President" with "the advice and consent of the Senate, without regard to political affiliation and solely on the basis of

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[12] That differentiation is common among agencies and their OIGs. Compare, *e.g.*, 7 U.S.C. 2201 (creating Department of Agriculture) with 5 U.S.C. App. 3 § 9(a)(1)(A) (creating Agriculture OIG); 20 U.S.C. 3411 (creating Department of Education) with 5 U.S.C. App. 3 § 9(a)(1)(D) (creating Education OIG); 29 U.S.C. 551 (creating Department of Labor) with 5 U.S.C. App. 3 § 9(a)(1)(J) (creating Labor OIG); 42 U.S.C. 3532 (creating Department of Housing and Urban Development) with 5 U.S.C. App. 3 § 9(a)(1)(G) (creating HUD OIG); 42 U.S.C. 7131 (creating Department of Energy) with 5 U.S.C. App. 3 § 9(a)(1)(E) (creating Energy OIG).

integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations," 5 U.S.C. App. 3 § 3(a). That general directive to an Inspector General to be "independent" within the agency is complemented by specific statutory functions that OIGs must perform free of agency management direction.

a. When the OIG conducts investigations of potential criminal and administrative law violations, neither the agency head nor the deputy may "prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation." 5 U.S.C. App. 3 § 3(a).[13] Instead, the OIG is authorized "to make such investigations and reports relating to the administration of the programs and operations of the applicable establishments as are, *in the judgment of the Inspector General*, necessary or desirable." 5 U.S.C. App. 3 § 6(a)(2) (emphasis added). As the House Report on the Inspector General Act explained, "[t]he purpose of this language is to insure that no restrictions are placed upon the Inspector General's freedom to investigate fraud, program abuse and other problems

[13] A narrow exception to that general principle is set forth in the special provisions of the Inspector General Act that authorize the Attorney General to prevent the Department of Justice OIG (DOG-OIG) from proceeding with an investigation that would disclose particularly sensitive law enforcement or national security information. See 5 U.S.C. App. 3 § 8E(a). According to the DOJ Inspector General, that provision has been invoked only once by the Attorney General since the creation of the DOJ-OIG. See M. Bromwich, *Running Special Investigations: The Inspector General Model*, 86 Geo. L.J. 2027, 2044 n.14 (1998). The Secretary of the Treasury has similar authority with respect to the Treasury OIG, see 5 U.S.C. App. 3 § 8D(a)(2), as does the Secretary of Defense with respect to an investigation or audit by the Department of Defense OIG, see 5 U.S.C. App. 3 § 8(b)(2).

relating to agency activities." H.R. Rep. No. 584, 95th Cong., 1st Sess. 14 (1977). See also 124 Cong. Rec. 30,952 (1978) (statement by Sen. Eagleton) (Inspector General Act "explicitly provides that even the head of the agency may not prohibit, prevent, or limit the Inspector General from undertaking and completing any audit and investigation which the Inspector General deems necessary"). Thus, if the head of the establishment asked the Inspector General "not to undertake a certain audit or investigation or to discontinue a certain audit or investigation," the Inspector General "would have the authority to refuse the request and to carry out his work." S. Rep. No. 1071, 95th Cong., 2d Sess. 26 (1978).

The Inspector General thus has the freedom to decide whether to investigate particular allegations of wrongdoing, what documents to request of agency officials, and what persons to interview. If during the course of an investigation the Inspector General learns of "reasonable grounds to believe that there has been a violation of Federal criminal law," the Inspector General Act requires him to "report expeditiously to the Attorney General," 5 U.S.C. App. 3 § 4(d), and to do so "directly, without notice to other agency officials," *NRC*, 25 F.3d at 234.[14]

[14] Conferring independence on the Inspector General was intended to correct a perceived deficiency in existing procedures for handling the investigation of internal affairs matters. "Justice Department officials responsible for prosecuting fraud against the Government testified that, with some exceptions, working relationships with other Federal departments and agencies on fraud matters are far from optimum." H.R. Rep. No. 584, *supra*, at 5. Those concerns were echoed in a floor statement by Representative Levitas, who observed that "administrators have an allegiance to their programs and are not inclined to pursue efforts that may

That independence in the conduct of investigations extends to the selection of personnel to perform the work. An Inspector General is empowered under the Inspector General Act to appoint an Assistant Inspector General for Investigations who is responsible "for supervising the performance of investigative activities relating to such programs and operations" of the agency. 5 U.S.C. App. 3 § 3(d)(2). An Inspector General also has the authority to select and employ whatever personnel are necessary to conduct its business, to employ experts and consultants, and to enter into contracts for audits, studies, and other necessary services. 5 U.S.C. App. 3 §§ 6(a), 7-9 (1994 & Supp. II 1996).

OIG investigative personnel conduct the full range of criminal and administrative investigations within the programmatic scope of the agency they oversee. 5 U.S.C. App. 3 § 4. See, *e.g.*, *New England Apple Council* v. *Donovan*, 725 F.2d 139, 143 (1st Cir. 1984) (as to those matters over which the OIG has investigative jurisdiction, the "functions of OIG investigators are no different from the functions of FBI agents"—both "investigate federal crimes, serve in undercover capacities, perform surveillance, and conduct investigatory interviews"); *Burlington Northern R.R.* v. *OIG*, 983 F.2d 631, 634 (5th Cir. 1993) (legislative history shows purpose of Inspector General Act "to consolidate existing auditing and investigative resources to more effectively combat fraud, abuse, waste and mismanage-

reveal fraud and reflect badly upon their programs. Who wants to be identified with a program that is full of cheaters?" 124 Cong. Rec. at 10,404-10,405.

ment in the programs and operations of [various executive] departments and agencies").[15]

b. The reporting functions of the OIG further demonstrate its independence from agency management. An Inspector General must submit semiannual reports to Congress on the results of the OIG's investigations. An agency head may add comments to the OIG's report, but cannot prevent the report from being transmitted to Congress or change its contents. 5 U.S.C. App. 3 § 5(b)(1). The same is true for reports of "particularly serious or flagrant problems, abuses, or deficiencies" in programs, which must be reported by the Inspector General to the head of the establishment involved and transmitted by that person to the appropriate committee or subcommittee of Congress within seven calendar days, along with a report prepared by the agency if the agency head deems one appropriate. 5 U.S.C. App. 3 § 5(d). Thus, in requiring certain reports by the Inspector General, Congress ensured that the agency head would have the authority to comment upon, but not alter, the Inspector General's report.[16]

[15] See, *e.g.*, U.S. Department of Agriculture Office of Inspector General, *Semiannual Report to Congress, FY 1998-Second Half* 4-5 (Nov. 1998) (describing food stamp and food program fraud investigations); Department of Health and Human Services Office of Inspector General, *Semiannual Report, April 1, 1998-September 30, 1998*, at 8-15, 23-25, 62-63 (describing medical laboratory fraud, employee misconduct, and criminal billing fraud investigations).

[16] The House report explained the rationale for this approach: "In order to prevent lengthy delays resulting from agency 'clearance' procedures, reports or information would be submitted by each Inspector General to the agency head and the Congress without further clearance or approval." H.R. Rep. No. 584, *supra*, at 3. See also S. Rep. No. 1071, *supra*, at 9 (The Inspector General "derives independence from the fact that the agency head can add

c. Although the Inspector General "report[s] to and [is] under the *general* supervision of the head [of the agency]," 5 U.S.C. App. 3 § 3(a) (emphasis added), only the President, not the agency head, may remove an Inspector General, 5 U.S.C. App. 3 § 3(b).[17] Congress imposed the requirement of "general supervision" to overcome concerns that the OIG's work might be "significantly impaired if [the Inspector General] does not have a smooth working relationship with the department head." S. Rep. No. 1071, *supra*, at 9. But that supervision does not extend to the most important specific functions performed by the OIG: "the agency head would have no authority to prevent the Inspector and Auditor General from initiating and completing audits and investigations he believes necessary." *Id.* at 7. Indeed, other than the "general supervision" of the agency head and one deputy, an Inspector General "shall not report to, or be subject to supervision by, any other officer of such [agency]." 5 U.S.C. App. 3 § 3(a).

Accordingly, "no one else in the agency may provide any supervision to [an] Inspector[] General," and an OIG is entirely "'shielded * * * from agency interference'" in the conduct of its work, *NRC*, 25 F.3d at

his comments to the semi-annual report" of the Inspector General "but cannot generally prevent it from going to Congress or change its contents.").

[17] Certain "designated Federal entities," listed in 5 U.S.C. App. 3 § 8G(a)(2) (1994 & Supp. II 1996), have an Inspector General appointed and removable by the head of the entity; in such entities if the Inspector General is removed from office the head of the entity must "promptly communicate in writing the reasons for any such removal or transfer to both Houses of the Congress." 5 U.S.C. App. 3 § 8G(e). NASA, the agency at issue here, is not among the designated federal entities, which include, *inter alia*, the FLRA. See *ibid.*; 5 U.S.C. App. 3 §§ 9(a)(1)(P) and 11(2).

234, which includes the following responsibilities and powers: to conduct audits and investigations of the agency as the OIG deems "necessary or desirable," 5 U.S.C. App. 3 § 6(a)(2); to have unfettered access to agency documents and personnel, 5 U.S.C. App. 3 § 6(a)(1) and (3)); to issue subpoenas for documentary evidence and administer oaths, 5 U.S.C. App. 3 § 6(a)(4) and (5)); and to "receive and investigate complaints or information from an[y] employee of the [agency] concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety," 5 U.S.C. App. 3 § 7(a).[18]

Just as agency management is prohibited from interfering with the functions of the OIG, so too the OIG is prohibited from performing the policy and programmatic functions of agency management. See generally *Inspector General Authority to Conduct Regulatory Investigations*, 13 Op. Off. Legal Counsel 54

[18] The Inspector General Act, however, does not confer the authority on OIGs to compel testimony from witnesses through subpoenas. An employee witness who refuses an OIG request for an interview may be compelled by agency management to appear at an OIG investigative interview. See 5 U.S.C. App. 3 § 6(a)(3) (authorizing Inspector General "to request such information or assistance" as is needed) and § 6(b) (providing that "the head of any Federal agency shall, insofar as is practicable and not in contravention of any existing statutory restriction or regulation * * * furnish to such Inspector General * * * such information or assistance"). Such testimony cannot be used against the witness in a criminal proceeding. See, *e.g.*, *Kalkines* v. *United States*, 473 F.2d 1391 (Ct. Cl. 1973). An employee who refuses to cooperate with an OIG investigation may be punished administratively for that refusal by the employing agency. See generally *LaChance* v. *Erickson*, 118 S. Ct. 753 (1998); 5 U.S.C. 7513.

(1989). When Congress required the transfer of offices and employees to OIGs under the Inspector General Act, it expressly provided that "there shall not be transferred to an Inspector General * * * program operating responsibilities." 5 U.S.C. App. 3 § 9(a). That prohibition was intended "to prevent compromising the independence and objectivity of the Offices of Inspector General," H.R. Rep. No. 584, *supra*, at 15, as well as to give OIGs "absolutely no policy responsibility" in the running of Executive Branch establishments, 124 Cong. Rec. 10,404 (1978) (statement of Rep. Horton).[19]

In particular, the OIG does not have a collective bargaining relationship with any union or even with its own employees. See 5 U.S.C. 7112(b)(7) (prohibiting "any employee primarily engaged in investigative or audit functions" functions from participating in a bargaining unit). Moreover, an OIG is not in a position to "initiate or continue a practice of imposing punishment" with respect to a bargaining unit employee, *Weingarten*, 420 U.S. at 260-261, because only employers can impose punishment. An OIG lacks statutory authority to impose punishment; it can only investigate suspected

[19] As Representative Horton explained, "It is important, Mr. Speaker, to remember and to realize that this new Office of Inspector General will have absolutely no policy responsibility. The new IG's are to be totally independent and free from political pressure. If I have any reservations at all, they are concerned with that independence. I would merely suggest that we keep an eye on these IG's and see to it that they have the freedom to operate independently." 124 Cong. Rec. at 10,404. Representative Levitas took up that theme: "The Inspectors General to be appointed by the President with the advice and consent of the Senate will first of all be independent and have no program responsibilities to divide allegiances. The Inspector General will be responsible for audits and investigations only." *Id.* at 10,405.

waste, fraud, and abuse. See 5 U.S.C. App. 3 §§ 4, 6. Indeed, just because an OIG finds instances of wrongdoing does not mean that the agency necessarily will impose discipline.[20] Thus, the concerns expressed in *Weingarten* that management would use the disciplinary process as a means of exerting coercive influence over employees in derogation of collectively bargained provisions does not arise in the context of an OIG investigation. See *Weingarten*, 420 U.S. at 262.

2. *The Inspector General Act imposes obligations on the OIG that are inconsistent with 5 U.S.C. 7114(a)(2)(B)*

a. Attendance of a union representative at an OIG interview can interfere with the reporting and nondisclosure obligations imposed by the Inspector General Act. That Act provides that the Inspector General must report directly to the Attorney General (and not to the agency head) if the Inspector General finds reasonable grounds to believe there has been a violation of Federal criminal law. 5 U.S.C. App. 3 § 4(d). But the OIG's duty to maintain confidentiality would be undermined if its interviews were open to union representatives as required by *Weingarten*.

[20] An example of that exercise of agency management discretion occurred after the Department of Justice OIG made findings of wrongdoing within the FBI Crime Laboratory. See Department of Justice Office of the Inspector General, *The FBI Laboratory: An Investigation Into Laboratory Practices and Alleged Misconduct in Explosives-Related And Other Cases* (1997). The Department of Justice management chose to impose discipline on only two FBI laboratory examiners among the thirteen past or present examiners and officers against whom the OIG had made findings of wrongdoing. See M. Sniffen, *Censure Urged for FBI Lab Employees*, Associated Press, Aug. 7, 1998.

The court of appeals mistakenly viewed the presence of a union representative as equivalent to the presence of legal counsel assisting an employee. See Pet. App. 14a. An attorney's first duty of loyalty is to the client, however, while a union representative's duty of loyalty is to the collective bargaining unit as a whole. See, *e.g.*, *E.I. DuPont de Nemours*, 289 N.L.R.B. at 629 (union steward has "obligation to represent the interests of the entire bargaining unit"). An employee's attorney may have incentives not to share information with other employees, in order to preserve the attorney-client privilege and avoid the appearance of witness tampering or obstructing a federal inquiry. See generally 18 U.S.C. 1512 (obstruction offense); P. Rice, *Attorney-Client Privilege in the United States* § 9.27 *et seq.* (1993) (describing what disclosures cause waivers of the privilege). By contrast, a union representative with a statutory right to attend an examination may well conclude that the interest of the bargaining unit would be best served by sharing information learned during the investigatory interview with other members of the collective bargaining unit, who might subsequently be interviewed or requested to produce documents. Thus the presence of a union representative has much more potential than that of a lawyer to undermine the investigation and the OIG's duty of confidentiality.

b. In addition, 5 U.S.C. App. 3 § 3 was designed to ensure that "no restrictions are placed upon the Inspector General's freedom to investigate" cases. H.R. Rep. No. 584, *supra*, at 14. By contrast, the statutory *Weingarten* provision as construed by the FLRA involves far more than the mere presence of a union representative at an interview, and thus imposes major restrictions on the OIG's freedom to investigate. Although the plain language of the statute requires

only the presence of a union representative at an interview, the FLRA has construed the Section 7114(a)(2)(B) right to include: the right to be informed in advance of the general subject of an examination so that the employee and union representative may consult before questioning begins, see *Federal Aviation Admin., New England Region, Burlington, Massachusetts*, 35 F.L.R.A. 645, 652-54 (1990); the right to halt the examination and to step outside the hearing of investigators to discuss with the union representative answers to the investigator's questions, see *United States Dep't of Justice, INS*, 46 F.L.R.A. 1526, 1553-1555, 1565-1569 (1993), rev'd on other grounds, *DOJ, supra*, 39 F.3d 361 (holding that the *Weingarten* right does not apply to OIGs, but the FLRA would recognize those rights in jurisdictions that require OIG compliance with 5 U.S.C. 7114(a)(2)(B)); and the right to negotiate for 48-hours' notice before an investigator can begin an examination (in criminal and non-criminal cases alike) of a union employee, see *U.S. Dep't of Justice, INS*, 40 F.L.R.A. 521, 549 (1991), rev'd on other grounds, *Department of Justice, INS* v. *FLRA*, 975 F.2d 218, 224-226 (5th Cir. 1992). If ultimately upheld by the courts as integral parts of the *Weingarten* rule, each of those rights would undermine an OIG's discretion to conduct an investigation in a manner consistent with sound practice. A union representative could do what the agency head cannot do – direct and limit how the Inspector General conducts an investigation. In concluding that NASA-OIG "points to no specific examples in which the assertion of *Weingarten* rights has interfered with OIG investigations," Pet. App. 14a, the court of appeals gave insufficient weight to the concerns expressed by OIGs over the broad expansion

of statutory *Weingarten* rights in the FLRA's decisions. See Gov't C.A. Br. 24.

One way in which OIGs have exercised their independence from agency management in conducting investigative work is through joint efforts with other law enforcement agencies. For example, according to data supplied by NASA-OIG, two-thirds of its investigative work consists of criminal investigations, and nearly one-half of those cases are conducted jointly with another law enforcement agency such as the FBI. Those joint investigations are typically conducted under a memorandum of understanding between an OIG and another law enforcement agency.[21] If the FLRA and the court of appeals were correct in characterizing OIG investigators as "representatives of the agency" subject to the *Weingarten* rule, then in a joint investigation conducted by the FBI and OIG the obligation to admit a union representative to an interview would depend on whether the particular interview was conducted by an FBI agent or an OIG investigator. That cannot be the law.

The OIG's independence is not diminished by the fact that an OIG investigation may eventually result in administratively-imposed discipline rather than criminal prosecution. It is widely recognized that allegations of workplace misconduct may lead to a criminal prose-

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[21] The FBI has memoranda of understanding (MOUs) with NASA-OIG and 17 other OIGs concerning referral and investigations of matters of "mutual interest." Most of those OIGs also have MOUs with the Attorney General deputizing their investigators as special agents with full law enforcement authority. The Department of Defense OIG and Department of Agriculture OIG have law enforcement authority pursuant to statute. See Pub. L. No. 105-85, § 1071, 111 Stat. 1897 (Defense OIG); 7 U.S.C. 2270 (Agriculture OIG).

cution, administrative discipline, or civil remedies. See, *e.g.*, FLRA C.A. Br. 39; Union-Intervenor C.A. Br. 42; Statement of DOJ Inspector General Michael Bromwich before the Commission on the Advancement of Federal Law Enforcement 4 (Nov. 12, 1998). The choice of sanction depends on many factors, including the strength of the evidence and the priorities that inform prosecutorial discretion. Those factors can be difficult to evaluate before an investigative interview has occurred or an investigation completed. The variety of possible outcomes to an investigation does not cast doubt on the independence or the law enforcement character of the agency that conducts the investigation.

As a practical matter, the FLRA order in this case plainly restricts the NASA-OIG investigation in a manner that directly contravenes the purposes of the Inspector General Act. The FLRA's order prevents NASA-OIG from questioning a NASA bargaining unit employee without union participation, no matter how serious the crime or what emergency circumstance might necessitate immediate questioning without the restrictions and limitations imposed by the FLRA. Pet. App. 52a. The court of appeals' affirmance of that order is inconsistent with the text of both the FSLMRS and the Inspector General Act.[22]

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[22] Finally, the silence of the FSLMRS in addressing its applicability to OIGs contrasts with Congress's deliberate inclusion of references to OIGs elsewhere in the Civil Service Reform Act (CSRA). The CSRA refers specifically to "the Inspector General of an agency" only in provisions relating to the creation of the Merit Systems Protection Board, see 5 U.S.C. 1213(a)(2); 5 U.S.C. 2302(b)(8)(B) & 2302(b)(9)(C), but not in the FSLMRS itself. The legislative history of the Inspector General Act in turn, refers to the CSRA only in connection with the same MSPB provision, and does not refer at all to the FSLMRA. See S. Rep. No. 1071, *supra*,

c. Finally, the FLRA has ruled that "nothing in section 7114(a)(2) * * * prevents parties from negotiating contractual rights to union representation beyond those provided by that section." *United States Dep't of Justice, Justice Management Div.*, 42 F.L.R.A. 412, 435 (1991). Thus a union may seek to expand the role of a union representative under the *Weingarten* rule, and to bargain such a proposal to impasse (or binding arbitration by the FLRA). See 5 U.S.C. 7119(b) and (c); see also *Social Sec. Admin.* v. *FLRA*, 956 F.2d 1280, 1282 (4th Cir. 1992) ("A duty to bargain over a proposal, therefore, does more than simply require an agency to negotiate; it subjects the agency to the possibility that the proposal will become binding.").

Indeed, in *United States Nuclear Regulatory Commission*, 47 F.L.R.A. 370, 377 (1993)—the decision reversed by the Fourth Circuit in *NRC*, *supra*, 25 F.3d 229—the FLRA ruled that organized components of an agency are required to negotiate regarding the "procedures" (5 U.S.C. 7106(b)(2)) and "appropriate arrangements" (5 U.S.C. 7106(b)(3)) that apply specifically to OIG investigations, even though the OIG itself was not a party to the collective bargaining agreement under the FSLMRS and is specifically prohibited under the Inspector General Act from the types of policy and programmatic responsibilities encompassed within the collective bargaining relationship. Despite the Fourth Circuit's reversal of that decision in *NRC*, the FLRA has given no indication of acquiescing in that decision in places outside of the Fourth Circuit.

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at 36. The silence of Section 7114 with respect to OIGs thus provides no support for the FLRA's conclusion that Congress intended to apply the provisions of the FSLMRS in OIG interviews of federal unionized employees.

Requiring OIGs to comply with the particular nuances of negotiated procedures contained in collective bargaining agreements could pose grave practical problems in numerous agencies that have dozens of different agreements with different unions. See pages 6-7, *supra*. Under the FLRA's approach, a violation of any such procedure by the OIG investigator would subject the OIG and the agency headquarters to an unfair labor practice charge.

C. The FLRA's Decision Is Not Entitled To Deference

The FLRA is ordinarily entitled to deference in its interpretation of the FSLMRS for a decision that is reasonable and consistent with the statutory text. *Department of the Treasury* v. *FLRA*, 494 U.S. 922, 928 (1990); *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 97 (1983). Deference is not appropriate in this case, however, for two reasons. First, the FLRA's decision is inconsistent with the statutory text, impermissibly expands the reach of the statutory mandate, and lacks a rational basis. See, *e.g.*, *NLRB* v. *FLRA*, 952 F.2d 523 (D.C. Cir. 1992). For the reasons described in Part I.A, *supra*, the FLRA's construction of the FSLMRS is contrary to the statutory language and thus is not entitled to deference.

Second, the FLRA's ruling in this case depends on a construction not of the FSLMRS, but also of the Inspector General Act, a subject about which the FLRA has no expertise whatsoever. See, *e.g.*, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); see, *e.g.*, *AFGE v. FLRA*, 46 F.3d 73, 76 (D.C. Cir. 1995) (stating that a court "of course, owe[s] no deference to the FLRA's interpretation of a statute that it is not charged with administering," and thus considers "*de novo* the effect of [statutes

other than the FSLMRS] on the * * * obligation to bargain over proposals relating to wages and benefits"). In misconstruing the Inspector General Act, the FLRA has violated the canon that statutes, where possible, should be construed to "foster harmony with other statutory and constitutional law." *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994). See also *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1018 (1984) ("But where two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.") (quotations omitted). The FLRA has also ruled inconsistently with the admonition that the FSLMRS "should be interpreted in a manner consistent with the requirement of an effective and efficient Government." 5 U.S.C. 7101(b).

D. The Court Of Appeals' Analysis Is Based On Flawed Premises

1. The court of appeals mistakenly viewed 5 U.S.C. 7114(a)(2)(B) as designed to protect federal employees in any investigation that might lead to disciplinary action, overlooking that the statute governs only the relationship between labor and management in a bargaining unit. The court of appeals opined that:

> The Statute [5 U.S.C. 7114(a)(2)(B)], like the *Weingarten* rule itself, focuses on the risk of adverse employment action to the employee. Because this risk does not disappear or diminish significantly when an investigator is employed in an agency component that has no collective bargaining relationship with the employee's union, we see no reason why the protection afforded by Congress should be eliminated in such situations.

Pet. App. 10a (citing *Defense Criminal Investigative Service* v. *FLRA*, 855 F.2d 93, 99 (3d Cir. 1988) (*DCIS*)).[23]

That conclusion is incorrect. As this Court noted in *Weingarten*, the concern there arose out of the unequal power between management – represented in *Weingarten* by a supervisor and a management-hired security officer – and the lone employee who was being interviewed. 420 U.S. at 261-262. The Court nowhere suggested that the potential for an employee to be disciplined by itself was sufficient to warrant the presence of a union representative for interviews conducted outside the context of the labor-management relationship.

Indeed, the prospect of disciplinary action alone cannot be the primary determinant in requiring the broad right to union representation advocated by the FLRA. If it were, an employee would have the right to union representation at an interview conducted by a police officer outside the presence of the employee's managers. Yet there are no reported decisions or scholarly commentaries even suggesting that a unionized employee has such a right in the law enforcement context, thus supporting the conclusion that it is well understood in private sector labor law that the employee has no such right. See pages 21-22 & n.9, *supra*.

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[23] The Eleventh Circuit reserved the question whether the *Weingarten* provision applies to interviews conducted in the course of a criminal investigation, see Pet App. 11a n.6, demurring for the time being on the Third Circuit's holding that the rule applies to all OIG interviews, whether criminal or administrative in nature. See *DCIS*, 855 F.2d at 100. In that respect, the Eleventh Circuit's view is inconsistent with *Weingarten* itself, which arose out of an investigation of an alleged crime. See 420 U.S. at 254-255.

Indeed, in this case both the FLRA and the Union have conceded that the *Weingarten* right would not apply to interviews of federal unionized employees by the FBI. See page 24, *supra*. An employee can reasonably believe that disciplinary action may follow an interview conducted by an FBI agent, because—like the OIG—the FBI routinely provides to agency management information about the investigation in the event prosecution is declined.[24] The same is true of the Secret Service, the Bureau of Alcohol, Tobacco, and Firearms, the Drug Enforcement Administration, the U.S. Marshals Service, and the Immigration and Naturalization Service.[25] As the D.C. Circuit observed, "[i]t

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[24] The routine-use provisions regarding disclosure of FBI records provide as follows:

> Personal information from this system may be disclosed as a routine use to any Federal agency where the purpose in making the disclosure is compatible with the law enforcement purpose for which it was collected, e.g., to assist the recipient agency in conducting a lawful criminal or intelligence investigation, to assist the recipient agency in making a determination concerning an individual's suitability for employment and/or trustworthiness for employment and/or trustworthiness for access clearance purposes, or to assist the recipient agency in the performance of any authorized function where access to records in this system is declared by the recipient agency to be relevant to that function.

63 Fed. Reg. 8659, 8682 (1998). Those routine-use provisions also authorize disclosure to non-federal government entities in certain circumstances. See *ibid.*

[25] See 62 Fed. Reg. 36,572 (1997) (INS Alien File and Central Index System); 62 Fed. Reg. 26,555 (1997) (INS Law Enforcement Support Center Database); 61 Fed. Reg. 54,219 (1996) (DEA); 60 Fed. Reg. 56,648 (1995) (Secret Service, BATF, and other Treasury components); 60 Fed. Reg. 18,853 (1995) (U.S. Marshals Service); 54 Fed. Reg. 42,060 (1989) (FBI, USMS, and various Department of Justice record systems); 31 C.F.R. 1.36 (listing routine uses and other exemptions in disclosure of Treasury agencies' records). State law enforcement agencies that interview federal employees in the investigation of crimes also routinely provide reports of investigation or interviews to federal agency officials.

is impossible to believe Congress intended" that "the Federal Labor Relations Authority, through its administration of section 7114(a)(2)(B) * * *, may oversee questioning by FBI agents." *DOJ*, 39 F.3d at 366.

The court's view of the statute as protecting any employee facing possible disciplinary action is inconsistent with the fact that statutory coverage is limited to questioning *by* "representatives of the agency," and it is limited to questioning *of* employees who are members of a bargaining unit. The provisions of the FSLMRS do not apply to all federal employees. Although Congress found "collective bargaining in the civil service [to be] in the public interest" because it "facilitates and encourages amicable settlements of disputes between employees and their employers involving conditions of employment," 5 U.S.C. 7101, Congress excluded from the collective bargaining process large categories of federal workers, including members of the armed services, supervisors and managers, aliens or noncitizens who work for the United States outside the country, and members of the Foreign Service, 5 U.S.C. 7103, and further excluded from the bargaining unit confidential employees, personnel specialists, administrators of FSLMRS provisions, national security workers, and employees engaged in investigative and audit functions, 5 U.S.C. 7112(b). Thus, the court oversimplified in characterizing the purpose of 5 U.S.C. 7114(a)(2)(B) "to extend *Weingarten* protection to federal employees" (Pet. App. 10a), without

recognizing that the statutory rights at issue in this case apply only to "disputes between [certain federal] employees *and their employers* involving conditions of employment." 5 U.S.C. 7101(a)(1)(C) (emphasis added).

2. The Court of Appeals for the Second Circuit has recognized that an OIG investigator does not become a "representative of the agency" subject to Section 7114(a)(2)(B) merely because an investigation concerns "'possible misconduct' of employees 'in connection with their work,' *DCIS/FLRA*, 855 F.2d at 100, or because the information obtained might be used to 'support administrative or disciplinary actions,' *FLRA/NASA*, 120 F.3d at 1213." *FLRA* v. *United States Dep't of Justice*, 137 F.3d 683, 691 (2d Cir. 1997), cert. pending, No. 98-667. However, the Second Circuit shared the concern of the FLRA that "Congress would [not] have wanted the *Weingarten* protection of the [FSLMRS] to be circumvented by a request from an agency head to have an OIG agent conduct an interrogation of the sort normally handled by agency personnel, an interrogation beyond the scope of OIG functions." *Id.* at 690-691. Therefore, the Second Circuit held that an OIG investigator is not a representative of the agency subject to 7114(a)(2)(B) unless the agent is "merely accommodating the agency by conducting interrogation of the sort traditionally performed by agency supervisory staff in the course of carrying out their personnel responsibility." *Id.* at 691.

The Second Circuit's rule would introduce uncertainty into the OIG investigative process in order to solve a nonexistent problem. While an agency head may request an Inspector General to undertake an investigation, the agency head can neither compel the OIG to conduct a particular investigation nor direct the manner in which it is conducted. Instead, the OIG must

make an independent decision whether to conduct any particular investigation, based on the importance of the matter and the OIG's capacity to do the work. See 5 U.S.C. App. 3 § 6(a)(2) (Inspector General has authority "to make such investigations * * * as are, in the judgment of the Inspector General, necessary or desirable"). Once an OIG undertakes an investigation, it is no longer subject to the control of agency management. Indeed, the Inspector General retains the independence to conclude that the fault in a particular matter lies less with the employee than with agency management, such as through neglectful supervision or training. Likewise, an inquiry by an OIG that begins with allegations by workers may result in criticism of agency management or agency workers-or both.[26] And the OIG investigator who conducts an examination of a unionized employee is therefore not a "representative of management" subject to Section 7114(a)(2)(B).

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[26] Compare, *e.g.*, Department of Justice Office of the Inspector General, *Alleged Deception of Congress: The Congressional Task Force on Immigration Reform's Fact-finding Visit to the Miami District of INS in June 1995* (June 1996) (criticizing INS management for creating a false impression of working conditions in investigation sparked by union complaints) with Department of Justice Office of the Inspector General, *Operation Gatekeeper: An Investigation Into Allegations of Fraud and Misconduct* (July 1998) (rejecting employee allegations of wrongdoing by management and criticizing union for tactics that delayed the investigation).

II. NASA HEADQUARTERS IS NOT GUILTY OF AN UNFAIR LABOR PRACTICE IF NASA-OIG DOES NOT COMPLY WITH 5 U.S.C. 7114(a)(2)(B)

The court below also held that NASA Headquarters was liable for an unfair labor practice on the ground that NASA-OIG infringed on the employee's rights under 5 U.S.C. 7114(a)(2)(B). Pet. App. 18a-19a. That conclusion is inconsistent with the construction of 5 U.S.C. 7114(a)(2)(B) and the Inspector General Act set forth above. If an OIG investigator cannot be held to have committed an unfair labor practice because he is not a "representative of the agency," the agency headquarters itself cannot be liable for the OIG's actions.[27]

Even if an OIG could be charged with an unfair labor practice for violating a federal employee's statutory *Weingarten* rights, it does not logically follow that an agency headquarters is also liable for the OIG's action. The decision below incorrectly construed the Inspector General Act and the FSLMRS to hold NASA Headquarters liable for the NASA-OIG's actions in this case. See Pet. App. 19a.

Section 7116(a) of Title 5 sets out the circumstances in which "it shall be an unfair labor practice for an agency" to engage in certain practices. Assuming that the OIG is found liable for an unfair labor practice as the "agency" in Section 7116(a) that "interfere[d] with, restrain[ed], or coerce[d] any employee in the exercise of any right under this chapter," there is no indication in the text of Section 7116 that the agency head-

[27] The Court does not have to reach this issue if it agrees that an OIG investigator is not a "representative of the agency" under 5 U.S.C. 7114(a)(2)(B). A reversal on that issue would also require a reversal of the unfair labor practice charged against NASA Headquarters.

quarters in which the OIG resides would also be liable for the OIG's actions.

By contrast, numerous provisions of the Inspector General Act establish the independence of the Inspector General from the head of the agency. See pages 26-33, *supra*. Those provisions range from the general provision creating the OIG as an "independent and objective unit[]," 5 U.S.C. App. 3 § 2, to the specific provisions that preclude the agency head or the deputy from "prevent[ing] or prohibit[ing] the Inspector General from initiating, carrying out, or completing any audit or investigation," 5 U.S.C. App. 3 § 3(a). Just as an agency head cannot "prevent or prohibit" (*ibid.*) the Inspector General from starting or completing an investigation, there is no statutory authority for the agency head to engage in the lesser step of prescribing the procedures the OIG must follow in conducting an inquiry.

The Fourth Circuit's decision in *NRC* is persuasive authority for why the parent agency should not be held liable for the actions of the OIG. In *NRC*, the court considered whether the OIG's manner of conducting investigations was a proper subject of collective bargaining between the agency and the union. The court correctly held that it was not. 25 F.3d at 234. The court reasoned that to permit such bargaining "would impinge on the statutory independence of the Inspector General." *Ibid.* "One of the most important goals of the Inspector General Act was to make Inspectors General independent enough that their investigations and audits would be wholly unbiased." *Id.* at 233. See generally *id.* at 233-236. The court further rejected the FLRA's argument that "the power of 'general supervision' given to the two top agency heads could be used

to limit or restrict the investigatory power of the Inspector General." *Id.* at 234.

The court then noted its disagreement with how the FLRA had "chosen to expand the limited holding of *Defense Criminal Investigative Service*" because such an expansion "would directly interfere with the ability of the Inspector General to conduct investigations." 25 F.3d at 235. An agency can neither bargain over the manner in which an OIG conducts its investigations nor order an OIG to comply with an interpretation of law in conducting an investigation or audit about which the OIG might have a good-faith disagreement.[28] Such an order would "directly interfere with the ability of the Inspector General to conduct investigations," *ibid.*, in the same ways that an agency's collective bargaining over the investigative methods and rules adversely affects an OIG's independence.

[28] That concern is not hypothetical. As the examples at pp. 34-35, *supra*, highlight, the scope of statutory *Weingarten* rights is uncertain. An OIG and an agency headquarters could quite reasonably disagree over whether an investigator must follow certain procedures to comply with rules that the FSLMRS does not elucidate but that eventually become law through FLRA decisions.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX A

SUBPART F—LABOR-MANAGEMENT AND EMPLOYEE RELATIONS CHAPTER 71—LABOR-MANAGEMENT RELATIONS
SUBCHAPTER I—GENERAL PROVISIONS

§ 7101. Findings and purpose

(a) The Congress finds that—

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

(A) safeguards the public interest,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

(b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which

are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.

§ 7102. Employees' rights

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

§ 7103. Definitions; application

(a) For the purpose of this chapter—

(1) "person" means an individual, labor organization, or agency;

(2) "employee" means an individual—

(A) employed in an agency; or

(B) whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not

obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority;

but does not include—

(i) an alien or noncitizen of the United States who occupies a position outside the United States;

(ii) a member of the uniformed services;

(iii) a supervisor or a management official;

(iv) an officer or employee in the Foreign Service of the United States employed in the Department of State, the International Communication Agency, the United States International Development Cooperation Agency, the Department of Agriculture, or the Department of Commerce; or

(v) any person who participates in a strike in violation of section 7311 of this title;

(3) "agency" means an Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of this title and the Veterans' Canteen Service, Department of Veterans Affairs), the Library of Congress, and the Government Printing Office, but does not include—

(A) the General Accounting Office;

(B) the Federal Bureau of Investigation;

(C) the Central Intelligence Agency;

(D) the National Security Agency;

(E) the Tennessee Valley Authority;

(F) the Federal Labor Relations Authority; or

(G) the Federal Service Impasses Panel.

(4) "labor organization" means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment, but does not include—

(A) an organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(B) an organization which advocates the overthrow of the constitutional form of government of the United States;

(C) an organization sponsored by an agency; or

(D) an organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike;

(5) "dues" means dues, fees, and assessments;

(6) "Authority" means the Federal Labor Relations Authority described in section 7104(a) of this title;

(7) "Panel" means the Federal Service Impasses Panel described in section 7119(c) of this title;

(8) "collective bargaining agreement" means an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter;

(9) "grievance" means any complaint—

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee, labor organization, or agency concerning—

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

(10) "supervisor" means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes

firefighters or nurses, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising such authority;

(11) "management official" means an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency;

(12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;

(13) "confidential employee" means an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations;

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute;

(15) "professional employee" means—

(A) an employee engaged in the performance of work—

(i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital (as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, mechanical, or physical activities);

(ii) requiring the consistent exercise of discretion and judgment in its performance;

(iii) which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work); and

(iv) which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or

(B) an employee who has completed the courses of specialized intellectual instruction and study described in subparagraph (A)(i) of this paragraph and is performing related work under appropriate direction or guidance to qualify the employee as a professional

employee described in subparagraph (A) of this paragraph;

(16) "exclusive representative" means any labor organization which—

(A) is certified as the exclusive representative of employees in an appropriate unit pursuant to section 7111 of this title; or

(B) was recognized by an agency immediately before the effective date of this chapter as the exclusive representative of employees in an appropriate unit—

(i) on the basis of an election, or

(ii) on any basis other than an election, and continues to be so recognized in accordance with the provisions of this chapter;

(17) "firefighter" means any employee engaged in the performance of work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment; and

(18) "United States" means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.

(b)(1) The President may issue an order excluding any agency or subdivision thereof from coverage under this chapter if the President determines that—

(A) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and

(B) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.

(2) The President may issue an order suspending any provision of this chapter with respect to any agency, installation, or activity located outside the 50 States and the District of Columbia, if the President determines that the suspension is necessary in the interest of national security.

§ 7104. Federal Labor Relations Authority

(a) The Federal Labor Relations Authority is composed of three members, not more than 2 of whom may be adherents of the same political party. No member shall engage in any other business or employment or hold another office or position in the Government of the United States except as otherwise provided by law.

(b) Members of the Authority shall be appointed by the President by and with the advice and consent of the Senate, and may be removed by the President only upon notice and hearing and only for inefficiency, neglect of duty, or malfeasance in office. The President shall designate one member to serve as Chairman of the Authority. The Chairman is the chief executive and administrative officer of the Authority.

(c) A member of the Authority shall be appointed for a term of 5 years. An individual chosen to fill a vacancy shall be appointed for the unexpired term of

the member replaced. The term of any member shall not expire before the earlier of—

(1) the date on which the member's successor takes office, or

(2) the last day of the Congress beginning after the date on which the member's term of office would (but for this paragraph) expire.

(d) A vacancy in the Authority shall not impair the right of the remaining members to exercise all of the powers of the Authority.

(e) The Authority shall make an annual report to the President for transmittal to the Congress which shall include information as to the cases it has heard and the decisions it has rendered.

(f)(1) The General Counsel of the Authority shall be appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years. The General Counsel may be removed at any time by the President. The General Counsel shall hold no other office or position in the Government of the United States except as provided by law.

(2) The General Counsel may—

(A) investigate alleged unfair labor practices under this chapter,

(B) file and prosecute complaints under this chapter, and

(C) exercise such other powers of the Authority as the Authority may prescribe.

(3) The General Counsel shall have direct authority over, and responsibility for, all employees in the office of General Counsel, including employees of the General Counsel in the regional offices of the Authority.

§ 7105. Powers and duties of the Authority

(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

(E) resolves issues relating to the duty to bargain in good faith under section 7117(c) of this title;

(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

(b) The Authority shall adopt an official seal which shall be judicially noticed.

(c) The principal office of the Authority shall be in or about the District of Columbia, but the Authority may meet and exercise any or all of its powers at any time or place. Except as otherwise expressly provided by law, the Authority may, by one or more of its members or by such agents as it may designate, make any appropriate inquiry necessary to carry out its duties wherever persons subject to this chapter are located. Any member who participates in the inquiry shall not be disqualified from later participating in a decision of the Authority in any case relating to the inquiry.

(d) The Authority shall appoint an Executive Director and such regional directors, administrative law judges under section 3105 of this title, and other

individuals as it may from time to time find necessary for the proper performance of its functions. The Authority may delegate to officers and employees appointed under this subsection authority to perform such duties and make such expenditures as may be necessary.

(e)(1) The Authority may delegate to any regional director its authority under this chapter—

(A) to determine whether a group of employees is an appropriate unit;

(B) to conduct investigations and to provide for hearings;

(C) to determine whether a question of representation exists and to direct an election; and

(D) to supervise or conduct secret ballot elections and certify the results thereof.

(2) The Authority may delegate to any administrative law judge appointed under subsection (d) of this section its authority under section 7118 of this title to determine whether any person has engaged in or is engaging in an unfair labor practice.

(f) If the Authority delegates any authority to any regional director or administrative law judge to take any action pursuant to subsection (e) of this section, the Authority may, upon application by any interested person filed within 60 days after the date of the action, review such action, but the review shall not, unless specifically ordered by the Authority, operate as a stay of action. The Authority may affirm, modify, or reverse any action reviewed under this subsection. If the Authority does not undertake to grant review of the

action under this subsection within 60 days after the later of—

(1) the date of the action; or

(2) the date of the filing of any application under this subsection for review of the action;

the action shall become the action of the Authority at the end of such 60-day period.

(g) In order to carry out its functions under this chapter, the Authority may—

(1) hold hearings;

(2) administer oaths, take the testimony or deposition of any person under oath, and issue subpenas as provided in section 7132 of this title; and

(3) may require an agency or a labor organization to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out the policies of this chapter.

(h) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Authority may appear for the Authority and represent the Authority in any civil action brought in connection with any function carried out by the Authority pursuant to this title or as otherwise authorized by law.

(i) In the exercise of the functions of the Authority under this title, the Authority may request from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or policy directives issued by the Office of Personnel Management in connection with any matter before the Authority.

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

SUBCHAPTER II—RIGHTS AND DUTIES OF AGENCIES AND LABOR ORGANIZATIONS

§ 7111. Exclusive recognition of labor organizations

(a) An agency shall accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election.

(b) If a petition is filed with the Authority—

(1) by any person alleging—

(A) in the case of an appropriate unit for which there is no exclusive representative, that 30 percent of the employees in the appropriate unit wish to be represented for the purpose of collective bargaining by an exclusive representative, or

(B) in the case of an appropriate unit for which there is an exclusive representative, that 30 percent of the employees in the unit allege that the exclusive representative is no longer

the representative of the majority of the employees in the unit; or

(2) by any person seeking clarification of, or an amendment to, a certification then in effect or a matter relating to representation;

the Authority shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, it shall provide an opportunity for a hearing (for which a transcript shall be kept) after reasonable notice. If the Authority finds on the record of the hearing that a question of representation exists, the Authority shall supervise or conduct an election on the question by secret ballot and shall certify the results thereof. An election under this subsection shall not be conducted in any appropriate unit or in any subdivision thereof within which, in the preceding 12 calendar months, a valid election under this subsection has been held.

(c) A labor organization which—

(1) has been designated by at least 10 percent of the employees in the unit specified in any petition filed pursuant to subsection (b) of this section;

(2) has submitted a valid copy of a current or recently expired collective bargaining agreement for the unit; or

(3) has submitted other evidence that it is the exclusive representative of the employees involved;

may intervene with respect to a petition filed pursuant to subsection (b) of this section and shall be placed on the ballot of any election under such subsection (b) with respect to the petition.

(d) The Authority shall determine who is eligible to vote in any election under this section and shall establish rules governing any such election, which shall include rules allowing employees eligible to vote the opportunity to choose—

(1) from labor organizations on the ballot, that labor organization which the employees wish to have represent them; or

(2) not to be represented by a labor organization.

In any election in which no choice on the ballot receives a majority of the votes cast, a runoff election shall be conducted between the two choices receiving the highest number of votes. A labor organization which receives the majority of the votes cast in an election shall be certified by the Authority as the exclusive representative.

(e) A labor organization seeking exclusive recognition shall submit to the Authority and the agency involved a roster of its officers and representatives, a copy of its constitution and bylaws, and a statement of its objectives.

(f) Exclusive recognition shall not be accorded to a labor organization—

(1) if the Authority determines that the labor organization is subject to corrupt influences or influences opposed to democratic principles;

(2) in the case of a petition filed pursuant to subsection (b)(1)(A) of this section, if there is not credible evidence that at least 30 percent of the employees in the unit specified in the petition wish to be represented for the purpose of collective

bargaining by the labor organization seeking exclusive recognition;

(3) if there is then in effect a lawful written collective bargaining agreement between the agency involved and an exclusive representative (other than the labor organization seeking exclusive recognition) covering any employees included in the unit specified in the petition, unless—

(A) the collective bargaining agreement has been in effect for more than 3 years, or

(B) the petition for exclusive recognition is filed not more than 105 days and not less than 60 days before the expiration date of the collective bargaining agreement; or

(4) if the Authority has, within the previous 12 calendar months, conducted a secret ballot election for the unit described in any petition under this section and in such election a majority of the employees voting chose a labor organization for certification as the unit's exclusive representative.

(g) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules or decisions of the Authority.

§ 7112. Determination of appropriate units for labor organization representation

(a) The Authority shall determine the appropriateness of any unit. The Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this chapter, the appropriate unit should be established on an agency, plant, installation, functional, or other basis

and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of the agency involved.

(b) A unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it includes—

(1) except as provided under section 7135(a)(2) of this title, any management official or supervisor;

(2) a confidential employee;

(3) an employee engaged in personnel work in other than a purely clerical capacity;

(4) an employee engaged in administering the provisions of this chapter;

(5) both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;

(6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or

(7) any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

(c) Any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization—

(1) which represents other individuals to whom such provision applies; or

(2) which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.

(d) Two or more units which are in an agency and for which a labor organization is the exclusive representative may, upon petition by the agency or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority shall certify the labor organization as the exclusive representative of the new larger unit.

§ 7113. National consultation rights

(a) If, in connection with any agency, no labor organization has been accorded exclusive recognition on an agency basis, a labor organization which is the exclusive representative of a substantial number of the employees of the agency, as determined in accordance with criteria prescribed by the Authority, shall be granted national consultation rights by the agency. National consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to any labor organization's eligibility for, or continuation of, national consultation rights shall be subject to determination by the Authority.

(b)(1) Any labor organization having national consultation rights in connection with any agency under subsection (a) of this section shall—

(A) be informed of any substantive change in conditions of employment proposed by the agency, and

(B) be permitted reasonable time to present its views and recommendations regarding the changes.

(2) If any views or recommendations are presented under paragraph (1) of this subsection to an agency by any labor organization—

(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

(c) Nothing in this section shall be construed to limit the right of any agency or exclusive representative to engage in collective bargaining.

§ 7114. Representation rights and duties

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if—

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation.

(3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subection.

(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

(5) The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from—

(A) being represented by an attorney or other representative, other than the exclusive representa-

tive, of the employee's own choosing in any grievance or appeal action; or

(B) exercising grievance or appellate rights established by law, rule, or regulation;

except in the case of grievance or appeal procedures negotiated under this chapter.

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

(c)(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

(4) A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency.

§ 7115. Allotments to representatives

(a) If an agency has received from an employee in an appropriate unit a written assignment which

authorizes the agency to deduct from the pay of the employee amounts for the payment of regular and periodic dues of the exclusive representative of the unit, the agency shall honor the assignment and make an appropriate allotment pursuant to the assignment. Any such allotment shall be made at no cost to the exclusive representative or the employee. Except as provided under subsection (b) of this section, any such assignment may not be revoked for a period of 1 year.

(b)An allotment under subsection (a) of this section for the deduction of dues with respect to any employee shall terminate when—

(1) the agreement between the agency and the exclusive representative involved ceases to be applicable to the employee; or

(2) the employee is suspended or expelled from membership in the exclusive representative.

(c)(1) Subject to paragraph (2) of this subsection, if a petition has been filed with the Authority by a labor organization alleging that 10 percent of the employees in an appropriate unit in an agency have membership in the labor organization, the Authority shall investigate the petition to determine its validity. Upon certification by the Authority of the validity of the petition, the agency shall have a duty to negotiate with the labor organization solely concerning the deduction of dues of the labor organization from the pay of the members of the labor organization who are employees in the unit and who make a voluntary allotment for such purpose.

(2)(A) The provisions of paragraph (1) of this subsection shall not apply in the case of any appropriate unit for which there is an exclusive representative.

(B) Any agreement under paragraph (1) of this subsection between a labor organization and an agency with respect to an appropriate unit shall be null and void upon the certification of an exclusive representative of the unit.

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or non-

preferential civil service status, political affiliation, marital status, or handicapping condition;

(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7)(A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

(c) For the purpose of this chapter it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure—

(1) to meet reasonable occupational standards uniformly required for admission, or

(2) to tender dues uniformly required as a condition of acquiring and retaining membership.

This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter.

(d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

(e) The expression of any personal view, argument, opinion or the making of any statement which—

(1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,

(2) corrects the record with respect to any false or misleading statement made by any person, or

(3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions, (A) constitute an unfair labor practice under any provision of this chapter, or (B) constitute grounds for the setting aside of any election conducted under any provisions of this chapter.

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

(b)(1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with

regulations prescribed by the Authority, whether such a compelling need exists.

(2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if—

(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

(B) the Authority determines that a compelling need for a rule or regulation does not exist.

(3) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall be expedited to the extent practicable and shall not include the General Counsel as a party.

(4) The agency, or primary national subdivision, as the case may be, which issued the rule or regulation shall be a necessary party at any hearing under this subsection.

(c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

(2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this

subsection, institute an appeal under this subsection by—

(A) filing a petition with the Authority; and

(B) furnishing a copy of the petition to the head of the agency.

(3) On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition under paragraph (2)(B) of this subsection, the agency shall—

(A) file with the Authority a statement—

(i) withdrawing the allegation; or

(ii) setting forth in full its reasons supporting the allegation; and

(B) furnish a copy of such statement to the exclusive representative.

(4) On or before the 15th day after the date of the receipt by the exclusive representative of a copy of a statement under paragraph (3)(B) of this subsection, the exclusive representative shall file with the Authority its response to the statement.

(5) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall not include the General Counsel as a party.

(6) The Authority shall expedite proceedings under this subsection to the extent practicable and shall issue to the exclusive representative and to the agency a written decision on the allegation and specific reasons therefor at the earliest practicable date.

(d)(1) A labor organization which is the exclusive representative of a substantial number of employees, determined in accordance with criteria prescribed by the Authority, shall be granted consultation rights by any agency with respect to any Government-wide rule or regulation issued by the agency effecting any substantive change in any condition of employment. Such consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to a labor organization's eligibility for, or continuation of, such consultation rights shall be subject to determination by the Authority.

(2) A labor organization having consultation rights under paragraph (1) of this subsection shall—

(A) be informed of any substantive change in conditions of employment proposed by the agency, and

(B) shall be permitted reasonable time to present its views and recommendations regarding the changes.

(3) If any views or recommendations are presented under paragraph (2) of this subsection to an agency by any labor organization—

(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

§ 7118. Prevention of unfair labor practices

(a)(1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

(2) Any complaint under paragraph (1) of this subsection shall contain a notice—

(A) of the charge;

(B) that a hearing will be held before the Authority (or any member thereof or before an individual employed by the authority and designated for such purpose); and

(C) of the time and place fixed for the hearing.

(3) The labor organization or agency involved shall have the right to file an answer to the original and any amended complaint and to appear in person or otherwise and give testimony at the time and place fixed in the complaint for the hearing.

(4)(A) Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued based on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority.

(B) If the General Counsel determines that the person filing any charge was prevented from filing the

charge during the 6-month period referred to in subparagraph (A) of this paragraph by reason of—

(i) any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person, or

(ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6-month period,

the General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice.

(5) The General Counsel may prescribe regulations providing for informal methods by which the alleged unfair labor practice may be resolved prior to the issuance of a complaint.

(6) The Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) shall conduct a hearing on the complaint not earlier than 5 days after the date on which the complaint is served. In the discretion of the individual or individuals conducting the hearing, any person involved may be allowed to intervene in the hearing and to present testimony. Any such hearing shall, to the extent practicable, be conducted in accordance with the provisions of subchapter II of chapter 5 of this title, except that the parties shall not be bound by rules of evidence, whether statutory, common law, or adopted by a court. A transcript shall be kept of the hearing. After such a hearing the Authority, in its discretion, may upon notice receive further evidence or hear argument.

(7) If the Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) determines after any hearing on a complaint under paragraph (5) of this subsection that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of fact and shall issue and cause to be served on the agency or labor organization an order—

(A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;

(B) requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;

(C) requiring reinstatement of an employee with backpay in accordance with section 5596 of this title; or

(D) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph or such other action as will carry out the purpose of this chapter.

If any such order requires reinstatement of an employee with backpay, backpay may be required of the agency (as provided in section 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.

(8) If the individual or individuals conducting the hearing determine that the preponderance of the evidence received fails to demonstrate that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, the individual or individuals shall state in writing their findings of fact and shall issue an order dismissing the complaint.

(b) In connection with any matter before the Authority in any proceeding under this section, the Authority may request, in accordance with the provisions of section 7105(i) of this title, from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or other policy directives issued by the Office of Personnel Management.

§ 7119. Negotiation impasses; Federal Service Impasses Panel

(a) The Federal Mediation and Conciliation Service shall provide services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses. The Service shall determine under what circumstances and in what manner it shall provide services and assistance.

(b) If voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or any other third-party mediation, fail to resolve a negotiation impasse—

(1) either party may request the Federal Service Impasses Panel to consider the matter, or

(2) the parties may agree to adopt a procedure for binding arbitration of the negotiation impasse, but only if the procedure is approved by the Panel.

(c)(1) The Federal Service Impasses Panel is an entity within the Authority, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives.

(2) The Panel shall be composed of a Chairman and at least six other members, who shall be appointed by the President, solely on the basis of fitness to perform the duties and functions involved, from among individuals who are familiar with Government operations and knowledgeable in labor-management relations.

(3) Of the original members of the Panel, 2 members shall be appointed for a term of 1 year, 2 members shall be appointed for a term of 3 years, and the Chairman and the remaining members shall be appointed for a term of 5 years. Thereafter each member shall be appointed for a term of 5 years, except that an individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. Any member of the Panel may be removed by the President.

(4) The Panel may appoint an Executive Director and any other individuals it may from time to time find necessary for the proper performance of its duties. Each member of the Panel who is not an employee (as defined in section 2105 of this title) is entitled to pay at a rate equal to the daily equivalent of the maximum annual rate of basic pay then currently paid under the General Schedule for each day he is engaged in the performance of official business of the Panel, including travel time, and is entitled to travel expenses as provided under section 5703 of this title.

(5)(A) The Panel or its designee shall promptly investigate any impasse presented to it under subsection (b) of this section. The Panel shall consider the impasse and shall either—

(i) recommend to the parties procedures for the resolution of the impasse; or

(ii) assist the parties in resolving the impasse through whatever methods and procedures, includeing factfinding and recommendations, it may consider appropriate to accomplish the purpose of this section.

(B) If the parties do not arrive at a settlement after assistance by the Panel under subparagraph (A) of this paragraph, the Panel may—

(i) hold hearings;

(ii) administer oaths, take the testimony or deposition of any person under oath, and issue subpenas as provided in section 7132 of this title; and

(iii) take whatever action is necessary and not inconsistent with this chapter to resolve the impasse.

(C) Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise.

§ 7120. Standards of conduct for labor organizations

(a) An agency shall only accord recognition to a labor organization that is free from corrupt influences

and influences opposed to basic democratic principles. Except as provided in subsection (b) of this section, an organization is not required to prove that it is free from such influences if it is subject to governing requirements adopted by the organization or by a national or international labor organization or federation of labor organizations with which it is affiliated, or in which it participates, containing explicit and detailed provisions to which it subscribes calling for—

(1) the maintenance of democratic procedures and practices including provisions for periodic elections to be conducted subject to recognized safeguards and provisions defining and securing the right of individual members to participate in the affairs of the organization, to receive fair and equal treatment under the governing rules of the organization, and to receive fair process in disciplinary proceedings;

(2) the exclusion from office in the organization of persons affiliated with communist or other totalitarian movements and persons identified with corrupt influences;

(3) the prohibition of business or financial interests on the part of organization officers and agents which conflict with their duty to the organization and its members; and

(4) the maintenance of fiscal integrity in the conduct of the affairs of the organization, including provisions for accounting and financial controls and regular financial reports or summaries to be made available to members.

(b) Notwithstanding the fact that a labor organization has adopted or subscribed to standards of conduct as provided in subsection (a) of this section, the organization is required to furnish evidence of its freedom from corrupt influences or influences opposed to basic democratic principles if there is reasonable cause to believe that—

(1) the organization has been suspended or expelled from, or is subject to other sanction, by a parent labor organization, or federation of organizations with which it had been affiliated, because it has demonstrated an unwillingness or inability to comply with governing requirements comparable in purpose to those required by subsection (a) of this section; or

(2) the organization is in fact subject to influences that would preclude recognition under

(c) A labor organization which has or seeks recognition as a representative of employees under this chapter shall file financial and other reports with the Assistant Secretary of Labor for Labor Management Relations, provide for bonding of officials and employees of the organization, and comply with trusteeship and election standards.

(d) The Assistant Secretary shall prescribe such regulations as are necessary to carry out the purposes of this section. Such regulations shall conform generally to the principles applied to labor organizations in the private sector. Complaints of violations of this section shall be filed with the Assistant Secretary. In any matter arising under this section, the Assistant Secretary may require a labor organization to cease and desist from violations of this section and require it to take

such actions as he considers appropriate to carry out the policies of this section.

(e) This chapter does not authorize participation in the management of a labor organization or acting as a representative of a labor organization by a management official, a supervisor, or a confidential employee, except as specifically provided in this chapter, or by an employee if the participation or activity would result in a conflict or apparent conflict of interest or would otherwise be incompatible with law or with the official duties of the employee.

(f) In the case of any labor organization which by omission or commission has willfully and intentionally, with regard to any strike, work stoppage, or slowdown, violated section 7116(b)(7) of this title, the Authority shall, upon an appropriate finding by the Authority of such violation—

(1) revoke the exclusive recognition status of the labor organization, which shall then immediately cease to be legally entitled and obligated to represent employees in the unit; or

(2) take any other appropriate disciplinary action.

APPENDIX B

INSPECTOR GENERAL ACT OF 1978

§ 1. Short title

This Act be cited as the "Inspector General Act of 1978".

§ 2. Purpose and establishment of Offices of Inspector General; departments and agencies involved

In order to create independent and objective units—

(1) to conduct and supervise audits and investigations relating to the programs and operations of the establishments listed in section 11(2);

(2) to provide leadership and coordination and recommend policies for activities designed (A) to promote economy, efficiency, and effectiveness in the administration of, and (B) to prevent and detect fraud and abuse in, such programs and operations; and

(3) to provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action;

there is hereby established in each of such establishments an office of Inspector General.

§ 3. Appointment of Inspector General; supervision; removal; political activities; appointment of Assistant Inspector General for Auditing and Assistant Inspector General for Investigations

(a) There shall be at the head of each Office an Inspector General who shall be appointed by the President, by and with the advice and consent of the Senate, without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations. Each Inspector General shall report to and be under the general supervision of the head of the establishment involved or, to the extent such authority is delegated, the officer next in rank below such head, but shall not report to, or be subject to supervision by, any other officer of such establishment. Neither the head of the establishment nor the officer next in rank below such head shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpena during the course of any audit or investigation.

(b) An Inspector General may be removed from office by the President. The President shall communicate the reasons for any such removal to both Houses of Congress.

(c) For the purposes of section 7324 of Title 5, United States Code, no Inspector General shall be considered to be an employee who determines policies to be pursued by the United States in the nationwide administration of Federal laws.

(d) Each Inspector General shall, in accordance with applicable laws and regulations governing the civil service—

(1) appoint an Assistant Inspector General for Auditing who shall have the responsibility for supervising the performance of auditing activities relating to programs and operations of the establishment, and

(2) appoint an Assistant Inspector General for Investigations who shall have the responsibility for supervising the performance of investigative activities relating to such programs and operations.

§ 4. Duties and responsibilities; report of criminal violations to Attorney General

(a) It shall be the duty and responsibility of each Inspector General, with respect to the establishment within which his Office is established—

(1) to provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of such establishment;

(2) to review existing and proposed legislation and regulations relating to programs and operations of such establishment and to make recommendations in the semiannual reports required by section 5(a) concerning the impact of such legislation or regulations on the economy and efficiency in the administration of programs and operations administered or financed by such establishment or the prevention and detection of fraud and abuse in such programs and operations;

(3) to recommend policies for, and to conduct, supervise, or coordinate other activities carried out or financed by such establishment for the purpose of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in, its programs and operations;

(4) to recommend policies for, and to conduct, supervise, or coordinate relationships between such establishment and other Federal agencies, State and local governmental agencies, and nongovernmental entities with respect to (A) all matters relating to the promotion of economy and efficiency in the administration of, or the prevention and detection of fraud and abuse in, programs and operations administered or financed by such establishment, or (B) the identification and prosecution of participants in such fraud or abuse; and

(5) to keep the head of such establishment and the Congress fully and currently informed, by means of the reports required by section 5 and otherwise, concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations administered or financed by such establishment, to recommend corrective action concerning such problems, abuses, and deficiencies, and to report on the progress made in implementing such corrective action.

(b)(1) In carrying out the responsibilities specified in subsection (a)(1), each Inspector General shall—

(A) comply with standards established by the Comptroller General of the United States for audits

of Federal establishments, organizations, programs, activities, and functions;

(B) establish guidelines for determining when it shall be appropriate to use non-Federal auditors; and

(C) take appropriate steps to assure that any work performed by non-Federal auditors complies with the standards established by the Comptroller General as described in paragraph (1).

(2) For purposes of determining compliance with paragraph (1)(A) with respect to whether internal quality controls are in place and operating and whether established audit standards, policies, and procedures are being followed by Offices of Inspector General of establishments defined under section 11(2), Offices of Inspector General of designated Federal entities defined under section 8F(a)(2), and any audit office established within a Federal entity defined under section 8F(a)(1), reviews shall be performed exclusively by an audit entity in the Federal Government, including the General Accounting Office or the Office of Inspector General of each establishment defined under section 11(2), or the Office of Inspector General of each designated Federal entity defined under section 8F(a)(2).

(c) In carrying out the duties and responsibilities established under this Act, each Inspector General shall give particular regard to the activities of the Comptroller General of the United States with a view toward avoiding duplication and insuring effective coordination and cooperation.

(d) In carrying out the duties and responsibilities established under this Act, each Inspector General shall

report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law.

§ 5. Semiannual reports; transmittal to Congress; availability to public; immediate report on serious or flagrant problems; disclosure of information; definitions.

(a) Each Inspector General shall, not later than April 30 and October 31 of each year, prepare semiannual reports summarizing the activities of the Office during the immediately preceding six-month periods ending March 31 and September 30. Such reports shall include, but need not be limited to—

(1) a description of significant problems, abuses, and deficiencies relating to the administration of programs and operations of such establishment disclosed by such activities during the reporting period;

(2) a description of the recommendations for corrective action made by the Office during the reporting period with respect to significant problems, abuses, or deficiencies identified pursuant to paragraph (1);

(3) an identification of each significant recommendation described in previous semiannual reports on which corrective action has not been completed;

(4) a summary of matters referred to prosecutive authorities and the prosecutions and convictions which have resulted;

(5) a summary of each report made to the head of the establishment under section 6(b)(2) during the reporting period;

(6) a listing, subdivided according to subject matter, of each audit report issued by the Office during the reporting period and for each audit report, where applicable, the total dollar value of questioned costs (including a separate category for the dollar value of unsupported costs) and the dollar value of recommendations that funds be put to better use;

(7) a summary of each particularly significant report;

(8) statistical tables showing the total number of audit reports and the total dollar value of questioned costs (including a separate category for the dollar value of unsupported costs), for audit reports—

(A) for which no management decision had been made by the commencement of the reporting period;

(B) which were issued during the reporting period;

(C) for which a management decision was made during the reporting period, including—

(i) the dollar value of disallowed costs; and

(ii) the dollar value of costs not disallowed; and

(D) for which no management decision has been made by the end of the reporting period;

(9) statistical tables showing the total number of audit reports and the dollar value of recommendations that funds be put to better use by management, for audit reports—

(A) for which no management decision had been made by the commencement of the reporting period;

(B) which were issued during the reporting period;

(C) for which a management decision was made during the reporting period, including—

(i) the dollar value of recommendations that were agreed to by management; and

(ii) the dollar value of recommendations that were not agreed to by management; and

(D) for which no management decision has been made by the end of the reporting period;

(10) a summary of each audit report issued before the commencement of the reporting period for which no management decision has been made by the end of the reporting period (including the date and title of each such report), an explanation of the reasons such management decision has not been made, and a statement concerning the desired timetable for achieving a management decision on each such report;

(11) a description and explanation of the reasons for any significant revised management decision made during the reporting period;

(12) information concerning any significant management decision with which the Inspector General is in disagreement; and

(13) the information described under Section 05(b) of the Federal Financial Management Act of 1996.

(b) Semiannual reports of each Inspector General shall be furnished to the head of the establishment involved not later than April 30 and October 31 of each year and shall be transmitted by such head to the appropriate committees or subcommittees of the Congress within thirty days after receipt of the report, together with a report by the head of the establishment containing—

(1) any comments such head determines appropriate;

(2) statistical tables showing the total number of audit reports and the dollar value of disallowed costs, for audit reports—

(A) for which final action had not been taken by the commencement of the reporting period;

(B) on which management decisions were made during the reporting period;

(C) for which final action was taken during the reporting period, including—

(i) the dollar value of disallowed costs that were recovered by management through collection, offset, property in lieu of cash, or otherwise; and

(ii) the dollar value of disallowed costs that were written off by management; and

(D) for which no final action has been taken by the end of the reporting period;

(3) statistical tables showing the total number of audit reports and the dollar value of recommendations that funds be put to better use by management agreed to in a management decision, for audit reports—

(A) for which final action had not been taken by the commencement of the reporting period;

(B) on which management decisions were made during the reporting period;

(C) for which final action was taken during the reporting period, including—

(i) the dollar value of recommendations that were actually completed; and

(ii) the dollar value of recommendations that management has subsequently concluded should not or could not be implemented or completed; and

(D) for which no final action has been taken by the end of the reporting period; and

(4) a statement with respect to audit reports on which management decisions have been made but

final action has not been taken, other than audit reports on which a management decision was made within the preceding year, containing—

(A) a list of such audit reports and the date each such report was issued;

(B) the dollar value of disallowed costs for each report;

(C) the dollar value of recommendations that funds be put to better use agreed to by management for each report; and

(D) an explanation of the reasons final action has not been taken with respect to each such audit report,

except that such statement may exclude such audit reports that are under formal administrative or judicial appeal or upon which management of an establishment has agreed to pursue a legislative solution, but shall identify the number of reports in each category so excluded.

(c) Within sixty days of the transmission of the semiannual reports of each Inspector General to the Congress, the head of each establishment shall make copies of such report available to the public upon request and at a reasonable cost. Within 60 days after the transmission of the semiannual reports of each establishment head to the Congress, the head of each establishment shall make copies of such report available to the public upon request and at a reasonable cost.

(d) Each Inspector General shall report immediately to the head of the establishment involved whenever the

Inspector General becomes aware of particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs and operations of such establishment. The head of the establishment shall transmit any such report to the appropriate committees or subcommittees of Congress within seven calendar days, together with a report by the head of the establishment containing any comments such head deems appropriate.

(e)(1) Nothing in this section shall be construed to authorize the public disclosure of information which is—

(A) specifically prohibited from disclosure by any other provision of law;

(B) specifically required by Executive order to be protected from disclosure in the interest of national defense or national security or in the conduct of foreign affairs; or

(C) a part of an ongoing criminal investigation.

(2) Notwithstanding paragraph (1)(C), any report under this section may be disclosed to the public in a form which includes information with respect to a part of an ongoing criminal investigation if such information has been included in a public record.

(3) Except to the extent and in the manner provided under section 6103(f) of the Internal Revenue Code of 1986 [26 U.S.C.A. § 6103(f)], nothing in this section or in any other provision of this Act shall be construed to authorize or permit the withholding of information from the Congress, or from any committee or subcommittee thereof.

(f) As used in this section—

(1) the term "questioned cost" means a cost that is questioned by the Office because of—

(A) an alleged violation of a provision of a law, regulation, contract, grant, cooperative agreement, or other agreement or document governing the expenditure of funds;

(B) a finding that, at the time of the audit, such cost is not supported by adequate documentation; or

(C) a finding that the expenditure of funds for the intended purpose is unnecessary or unreasonable;

(2) the term "unsupported cost" means a cost that is questioned by the Office because the Office found that, at the time of the audit, such cost is not supported by adequate documentation;

(3) the term "disallowed cost" means a questioned cost that management, in a management decision, has sustained or agreed should not be charged to the Government;

(4) the term "recommendation that funds be put to better use" means a recommendation by the Office that funds could be used more efficiently if management of an establishment took actions to implement and complete the recommendation, including—

(A) reductions in outlays;

(B) deobligation of funds from programs or operations;

(C) withdrawal of interest subsidy costs on loans or loan guarantees, insurance, or bonds;

(D) costs not incurred by implementing recommended improvements related to the operations of the establishment, a contractor or grantee;

(E) avoidance of unnecessary expenditures noted in preaward reviews of contract or grant agreements; or

(F) any other savings which are specifically identified;

(5) the term "management decision" means the evaluation by the management of an establishment of the findings and recommendations included in an audit report and the issuance of a final decision by management concerning its response to such findings and recommendations, including actions concluded to be necessary; and

(6) the term "final action" means—

(A) the completion of all actions that the management of an establishment has concluded, in its management decision, are necessary with respect to the findings and recommendations included in an audit report; and

(B) in the event that the management of an establishment concludes no action is necessary, final action occurs when a management decision has been made.

§ 6. Authority of Inspector General; information and assistance from Federal agencies; unreasonable refusal; office space and equipment

(a) In addition to the authority otherwise provided by this Act, each Inspector General, in carrying out the provisions of this Act, is authorized—

(1) to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act;

(2) to make such investigations and reports relating to the administration of the programs and operations of the applicable establishment as are, in the judgment of the Inspector General, necessary or desirable;

(3) to request such information or assistance as may be necessary for carrying out the duties and responsibilities provided by this Act from any Federal, State, or local governmental agency or unit thereof;

(4) to require by subpena the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by this Act, which subpena, in the case of contumacy or refusal to obey, shall be enforceable by order of any appropriate United States district court: *Provided*, That procedures other than subpenas shall be used by the Inspector General to

obtain documents and information from Federal agencies;

(5) to administer to or take from any person an oath, affirmation, or affidavit, whenever necessary in the performance of the functions assigned by this Act, which oath, affirmation, or affidavit when administered or taken by or before an employee of an Office of Inspector General designated by the Inspector General shall have the same force and effect as if administered or taken by or before an officer having a seal;

(6) to have direct and prompt access to the head of the establishment involved when necessary for any purpose pertaining to the performance of functions and responsibilities under this Act;

(7) to select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers, and duties of the Office subject to the provisions of title 5, United States Code, governing appointments in the competitive service, and the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates;

(8) to obtain services as authorized by section 3109 of Title 5, United States Code, at daily rates not to exceed the equivalent rate prescribed for grade GS-18 of the General Schedule by section 5332 of Title 5, United States Code; and

(9) to the extent and in such amounts as may be provided in advance by appropriations Acts, to enter into contracts and other arrangements for

audits, studies, analyses, and other services with public agencies and with private persons, and to make such payments as may be necessary to carry out the provisions of this Act.

(b)(1) Upon request of an Inspector General for information or assistance under subsection (a)(3), the head of any Federal agency involved shall, insofar as is practicable and not in contravention of any existing statutory restriction or regulation of the Federal agency from which the information is requested, furnish to such Inspector General, or to an authorized designee, such information or assistance.

(2) Whenever information or assistance requested under subsection (a)(1) or (a)(3) is, in the judgment of an Inspector General, unreasonably refused or not provided, the Inspector General shall report the circumstances to the head of the establishment involved without delay.

(c) Each head of an establishment shall provide the Office within such establishment with appropriate and adequate office space at central and field office locations of such establishment, together with such equipment, office supplies, and communications facilities and services as may be necessary for the operation of such offices, and shall provide necessary maintenance services for such offices and the equipment and facilities located therein.

(d) For purposes of the provisions of title 5, United States Code, governing the Senior Executive Service, any reference in such provisions to the "appointing authority" for a member of the Senior Executive Service or for a Senior Executive Service position shall, if such member or position is or would be within the

Office of an Inspector General, be deemed to be a reference to such Inspector General.

§ 7. Complaints by employees; disclosure of identity; reprisals

(a) The Inspector General may receive and investigate complaints or information from an employee of the establishment concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety.

(b) The Inspector General shall not, after receipt of a complaint or information from an employee, disclose the identity of the employee without the consent of the employee, unless the Inspector General determines such disclosure is unavoidable during the course of the investigation.

(c) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or threaten to take any action against any employee as a reprisal for making a complaint or disclosing information to an Inspector General, unless the complaint was made or the information disclosed with the knowledge that it was false or with willful disregard for its truth or falsity.

§ 8. Additional provisions with respect to the Inspector General of the Department of Defense

(a) No member of the Armed Forces, active or reserve, shall be appointed Inspector General of the Department of Defense.

(b)(1) Notwithstanding the last two sentences of section 3(a), the Inspector General shall be under the authority, direction, and control of the Secretary of Defense with respect to audits or investigations, or the issuance of subpoenas, which require access to information concerning—

(A) sensitive operational plans;

(B) intelligence matters;

(C) counterintelligence matters;

(D) ongoing criminal investigations by other administrative units of the Department of Defense related to national security; or

(E) other matters the disclosure of which would constitute a serious threat to national security.

(2) With respect to the information described in paragraph (1) the Secretary of Defense may prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena, after the Inspector General has decided to initiate, carry out or complete such audit or investigation or to issue such subpoena, if the Secretary determines that such prohibition is necessary to preserve the national security interests of the United States.

(3) If the Secretary of Defense exercises any power under paragraph (1) or (2), the Inspector General shall submit a statement concerning such exercise within thirty days to the Committees on Armed Services and Governmental Affairs of the Senate and the Committee on National Security and

the Committee on Government Reform and Oversight of the House of Representatives and to other appropriate committees or subcommittees of the Congress.

(4) The Secretary shall, within thirty days after submission of a statement under paragraph (3), transmit a statement of the reasons for the exercise of power under paragraph (1) or (2) to the congressional committees specified in paragraph (3) and to other appropriate committees or subcommittees.

(c) In addition to the other duties and responsibilities specified in this Act, the Inspector General of the Department of Defense shall—

(1) be the principal adviser to the Secretary of Defense for matters relating to the prevention and detection of fraud, waste, and abuse in the programs and operations of the Department;

(2) initiate, conduct, and supervise such audits and investigations in the Department of Defense (including the military departments) as the Inspector General considers appropriate;

(3) provide policy direction for audits and investigations relating to fraud, waste, and abuse and program effectiveness;

(4) investigate fraud, waste, and abuse uncovered as a result of other contract and internal audits, as the Inspector General considers appropriate;

(5) develop policy, monitor and evaluate program performance, and provide guidance with respect to all Department activities relating to criminal investigation programs;

(6) monitor and evaluate the adherence of Department auditors to internal audit, contract audit, and internal review principles, policies, and procedures;

(7) develop policy, evaluate program performance, and monitor actions taken by all components of the Department in response to contract audits, internal audits, internal review reports, and audits conducted by the Comptroller General of the United States;

(8) request assistance as needed from other audit, inspection, and investigative units of the Department of Defense (including military departments); and

(9) give particular regard to the activities of the internal audit, inspection, and investigative units of the military departments with a view toward avoiding duplication and insuring effective coordination and cooperation.

(d) Notwithstanding section 4(d), the Inspector General of the Department of Defense shall expeditiously report suspected or alleged violations of chapter 47 of title 10, United States Code (Uniform Code of Military Justice), to the Secretary of the military department concerned or the Secretary of Defense.

(e) For the purposes of section 7, a member of the Armed Forces shall be deemed to be an employee of the

Department of Defense, except that, when the Coast Guard operates as a service of another department or agency of the Federal Government, a member of the Coast Guard shall be deemed to be an employee of such department or agency.

(f)(1) Each semiannual report prepared by the Inspector General of the Department of Defense under section 5(a) shall include information concerning the numbers and types of contract audits conducted by the Department during the reporting period. Each such report shall be transmitted by the Secretary of Defense to the Committees on Armed Services and Governmental Affairs of the Senate and the Committee on National Security and the Committee on Government Reform and Oversight of the House of Representatives and to other appropriate committees or subcommittees of the Congress.

(2) Any report required to be transmitted by the Secretary of Defense to the appropriate committees or subcommittees of the Congress under section 5(d) shall also be transmitted, within the seven-day period specified in such section, to the congressional committees specified in paragraph (1).

(g) The provisions of section 1385 of title 18, United States Code, shall not apply to audits and investigations conducted by, under the direction of, or at the request of the Inspector General of the Department of Defense to carry out the purposes of this Act.

§ 8A. Special provisions relating to the Agency for International Development

(a) In addition to the other duties and responsibilities specified in this Act, the Inspector General of the Agency for International Development—

(1) shall supervise, direct, and control all security activities relating to the programs and operations of that Agency, subject to the supervision of the Administrator of that Agency; and

(2) to the extent requested by the Director of the United States International Development Cooperation Agency (after consultation with the Administrator of the Agency for International Development), shall supervise, direct, and control all audit, investigative, and security activities relating to programs and operations within the United States International Development Cooperation Agency.

(b) In addition to the Assistant Inspector Generals provided for in section 3(d) of this Act, the Inspector General of the Agency for International Development shall, in accordance with applicable laws and regulations governing the civil service, appoint an Assistant Inspector General for Security who shall have the responsibility for supervising the performance of security activities relating to programs and operations of the Agency for International Development.

(c) The semiannual reports required to be submitted to the Administrator of the Agency for International Development pursuant to section 5(b) of this Act shall also be submitted to the Director of the United States International Development Cooperation Agency.

(d) In addition to the officers and employees provided for in section 6(a)(6) of this Act, members of the Foreign Service may, at the request of the Inspector General of the Agency for International Development, be assigned as employees of the Inspector General. Members of the Foreign Service so assigned shall be responsible solely to the Inspector General, and the Inspector General (or his or her designee) shall prepare the performance evaluation reports for such members.

(e) In establishing and staffing field offices pursuant to sectior 6(c) of this Act, the Administrator of the Agency for International Development shall not be bound by overseas personnel ceilings established under the Monitoring Overseas Direct Employment policy.

(f) The reference in section 7(a) of this Act to an employee of the establishment shall, with respect to the Inspector General of the Agency for International Development, be construed to include an employee of or under the United States International Development Cooperation Agency.

(g) The Inspector General of the Agency for International Development shall be in addition to the officers provided for in section 624(a) of the Foreign Assistance Act of 1961 [22 U.S.C. § 2384(a)].

(h) As used in this Act, the term "Agency for International Development" includes any successor agency primarily responsible for administering part I of the Foreign Assistance Act of 1961 [22 U.S.C.A. § 2151 et seq.].

§ 8B. Special provisions concerning the Nuclear Regulatory Commission

(a) The Chairman of the Commission may delegate the authority specified in the second sentence of section 3(a) to another member of the Nuclear Regulatory Commission, but shall not delegate such authority to any other officer or employee of the Commission.

(b) Notwithstanding sections 6(a)(7) and (8), the Inspector General of the Nuclear Regulatory Commission is authorized to select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers and duties of the Office of Inspector General and to obtain the temporary or intermittent services of experts or consultants or an organization thereof, subject to the applicable laws and regulations that govern such selections, appointments and employment, and the obtaining of such services, within the Nuclear Regulatory Commission.

§ 8C. Special provisions concerning the Federal Deposit Insurance Corporation

(a) Delegation.—The Chairperson of the Federal Deposit Insurance Corporation may delegate the authority specified in the second sentence of section 3(a) to the Vice Chairperson of the Board of Directors of the Federal Deposit Insurance Corporation, but may not delegate such authority to any other officer or employee of the Corporation.

(b) Personnel.—Notwithstanding paragraphs (7) and (8) of section 6(a), the Inspector General of the Federal Deposit Insurance Corporation may select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers, and duties of the Office of Inspector General

and to obtain the temporary or intermittent services of experts or consultants or an organization of experts or consultants, subject to the applicable laws and regulations that govern such selections, appointments, and employment, and the obtaining of such services, within the Federal Deposit Insurance Corporation.

§ 8D. Special provisions concerning the Department of the Treasury

(a)(1) Notwithstanding the last two sentences of section 3(a), the Inspector General of the Department of the Treasury shall be under the authority, direction, and control of the Secretary of the Treasury with respect to audits or investigations, or the issuance of subpenas, which require access to sensitive information concerning—

(A) ongoing criminal investigations or proceedings;

(B) undercover operations;

(C) the identity of confidential sources, including protected witnesses;

(D) deliberations and decisions on policy matters, including documented information used as a basis for making policy decisions, the disclosure of which could reasonably be expected to have a significant influence on the economy or market behavior;

(E) intelligence or counterintelligence matters; or

(F) other matters the disclosure of which would constitute a serious threat to national security or to

the protection of any person or property authorized protection by section 3056 of title 18, United States Code, section 202 of title 3, United States Code, or any provision of the Presidential Protection Assistance Act of 1976 (18 U.S.C. 3056 note; Public Law 94-524).

(2) With respect to the information described under paragraph (1), the Secretary of the Treasury may prohibit the Inspector General of the Department of the Treasury from carrying out or completing any audit or investigation, or from issuing any subpena, after such Inspector General has decided to initiate, carry out, or complete such audit or investigation or to issue such subpena, if the Secretary determines that such prohibition is necessary to prevent the disclosure of any information described under paragraph (1) or to prevent significant impairment to the national interests of the United States.

(3) If the Secretary of the Treasury exercises any power under paragraph (1) or (2), the Secretary of the Treasury shall notify the Inspector General in writing stating the reasons for such exercise. Within 30 days after receipt of any such notice, the Inspector General shall transmit a copy of such notice to the Committees on Governmental Affairs and Finance of the Senate and the Committees on Government Operations and Ways and Means of the House of Representatives, and to other appropriate committees or subcommittees of the Congress.

(b) In carrying out the duties and responsibilities specified in this Act, the Inspector General of the Department of the Treasury shall have oversight responsibility for the internal investigations performed by the Office of Internal Affairs of the Bureau of Alcohol,

Tobacco and Firearms, the Office of Internal Affairs of the United States Customs Service, and the Office of Inspections of the United States Secret Service, and the internal audits and internal investigations performed by the Office of Assistant Commissioner (Inspection) of the Internal Revenue Service. The head of each such office shall promptly report to the Inspector General the significant activities being carried out by such office.

(c) Notwithstanding subsection (b), the Inspector General of the Department of the Treasury may initiate, conduct and supervise such audits and investigations in the Department of the Treasury (including the bureaus and services referred to in subsection (b)) as the Inspector General of the Department of the Treasury considers appropriate.

(d) If the Inspector General of the Department of the Treasury initiates an audit or investigation under subsection (c) concerning a bureau or service referred to in subsection (b), the Inspector General of the Department of the Treasury may provide the head of the office of such bureau or service referred to in subsection (b) with written notice that the Inspector General of the Department of the Treasury has initiated such an audit or investigation. If the Inspector General of the Department of the Treasury issues a notice under the preceding sentence, no other audit or investigation shall be initiated into the matter under audit or investigation by the Inspector General of the Department of the Treasury and any other audit or investigation of such matter shall cease.

(e)(1) The Treasury Inspector General shall have access to returns and return information, as defined in section 6103(b) of the Internal Revenue Code of 1986

[26 U.S.C.A. 6103(b)], only in accordance with the provisions of section 6103 of such Code [26 U.S.C.A. 6103] and this Act.

(2) Access by the Inspector General to returns and return information under section 6103(h)(1) of such Code [26 U.S.C. 6103(h)(1)] shall be subject to the following additional requirements:

(A) In order to maintain internal controls over access to returns and return information, the Inspector General, or in the absence of the Inspector General, the Acting Inspector General, the Deputy Inspector General, the Assistant Inspector General for Audits, or the Assistant Inspector General for Investigations, shall provide to the Assistant Commissioner (Inspection) of the Internal Revenue Service written notice of the Inspector General's intent to access returns and return information. If the Inspector General determines that the Inspection Service of the Internal Revenue Service should not be made aware of a notice of access to returns and return information, such notice shall be provided to the Senior Deputy Commissioner of Internal Revenue.

(B) Such notice shall clearly indicate the specific returns or return information being accessed, contain a certification by the Inspector General, or in the absence of the Inspector General, the Acting Inspector General, the Deputy Inspector General, the Assistant Inspector General for Audits, or the Assistant Inspector General for Investigations, that the returns or return information being accessed are needed for a purpose described under section 6103(h)(1) of the Internal Revenue Code of 1986 [26

U.S.C. 6103(h)(1)], and identify those employees of the Office of Inspector General of the Department of the Treasury who may receive such returns or return information.

(C) The Internal Revenue Service shall maintain the same system of standardized records or accountings of all requests from the Treasury Inspector General for inspection or disclosure of returns and return information (including the reasons for and dates of such requests), and of returns and return information inspected or disclosed pursuant to such requests, as described under section 6103(p)(3)(A) of the Internal Revenue Code of 1986 [26 U.S.C.A. 6103(p)(3)(A)]. Such system of standardized records or accountings shall also be available for examination in the same manner as provided under section 6103(p)(3) of the Internal Revenue Code of 1986.

(D) The Inspector General shall be subject to the same safeguards and conditions for receiving returns and return information as are described under section 6103(p)(4) of the Internal Revenue Code of 1986 [26 U.S.C. 6103(p)(4)].

(f) An audit or investigation conducted by the Inspector General shall not affect a final decision of the Secretary of the Treasury or his delegate under section 6406 of the Internal Revenue Code of 1986 [26 U.S.C.A. 6406].

(g) Notwithstanding section 4(d), in matters involving chapter 75 of the Internal Revenue Code of 1986 [26 U.S.C. 7201 et seq.], the Inspector General shall report expeditiously to the Attorney General only offenses under section 7214 of such Code [26 U.S.C. 7214], unless

the Inspector General obtains the consent of the Commissioner of the Internal Revenue to exercise additional reporting authority with respect to such chapter.

(h) Any report required to be transmitted by the Secretary of the Treasury to the appropriate committees or subcommittees of the Congress under section 5(d) shall also be transmitted, within the seven-day period specified under such section, to the Committees on Governmental Affairs and Finance of the Senate and the Committees on Government Operations and Ways and Means of the House of Representatives.

§ 8E. Special provisions concerning the Department of Justice

(a)(1) Notwithstanding the last two sentences of section 3(a), the Inspector General shall be under the authority, direction, and control of the Attorney General with respect to audits or investigations, or the issuance of subpenas, which require access to sensitive information concerning—

(A) ongoing civil or criminal investigations or proceedings;

(B) undercover operations;

(C) the identity of confidential sources, including protected witnesses;

(D) intelligence or counterintelligence matters; or

(E) other matters the disclosure of which would constitute a serious threat to national security.

(2) With respect to the information described under paragraph (1), the Attorney General may prohibit the Inspector General from carrying out or completing any audit or investigation, or from issuing any subpena, after such Inspector General has decided to initiate, carry out, or complete such audit or investigation or to issue such subpena, if the Attorney General determines that such prohibition is necessary to prevent the disclosure of any information described under paragraph (1) or to prevent the significant impairment to the national interests of the United States.

(3) If the Attorney General exercises any power under paragraph (1) or (2), the Attorney General shall notify the Inspector General in writing stating the reasons for such exercise. Within 30 days after receipt of any such notice, the Inspector General shall transmit a copy of such notice to the Committees on Governmental Affairs and Judiciary of the Senate and the Committees on Government Operations and Judiciary of the House of Representatives, and to other appropriate committees or subcommittees of the Congress.

(b) In carrying out the duties and responsibilities specified in this Act, the Inspector General of the Department of Justice—

(1) may initiate, conduct and supervise such audits and investigations in the Department of Justice as the Inspector General considers appropriate;

(2) shall give particular regard to the activities of the Counsel, Office of Professional Responsibility of the Department and the audit, internal investigative, and inspection units outside the Office of Inspector General with a view toward avoiding

duplication and insuring effective coordination and cooperation; and

(3) shall refer to the Counsel, Office of Professional Responsibility of the Department for investigation, information or allegations relating to the conduct of an officer or employee of the Department of Justice employed in an attorney, criminal investigative, or law enforcement position that is or may be a violation of law, regulation, or order of the Department or any other applicable standard of conduct, except that no such referral shall be made if the officer or employee is employed in the Office of Professional Responsibility of the Department.

(c) Any report required to be transmitted by the Attorney General to the appropriate committees or subcommittees of the Congress under section 5(d) shall also be transmitted, within the seven-day period specified under such section, to the Committees on the Judiciary and Governmental Affairs of the Senate and the Committees on the Judiciary and Government Operations of the House of Representatives.

§ 8F. Special provisions concerning the Corporation for National and Community Service

(a) Notwithstanding the provisions of paragraphs (7) and (8) of section 6(a), it is within the exclusive jurisdiction of the Inspector General of the Corporation for National and Community Service to—

(1) appoint and determine the compensation of such officers and employees in accordance with section 195(b) of the National and Community Service Trust Act of 1993; and

(2) procure the temporary and intermittent services of and compensate such experts and consultants, in accordance with section 3109(b) of title 5, United States Code, as may be necessary to carry out the functions, powers, and duties of the Inspector General.

(b) No later than the date on which the Chief Executive Officer of the Corporation for National and Community Service transmits any report to the Congress under subsection (a) or (b) of section 5, the Chief Executive Officer shall transmit such report to the Board of Directors of such Corporation.

(c) No later than the date on which the Chief Executive Officer of the Corporation for National and Community Service transmits a report described under section 5(b) to the Board of Directors as provided under subsection (b) of this section, the Chief Executive Officer shall also transmit any audit report which is described in the statement required under section 5(b)(4) to the Board of Directors. All such audit reports shall be placed on the agenda for review at the next scheduled meeting of the Board of Directors following such transmittal. The Chief Executive Officer of the Corporation shall be present at such meeting to provide any information relating to such audit reports.

(d) No later than the date on which the Inspector General of the Corporation for National and Community Service reports a problem, abuse, or deficiency under section 5(d) to the Chief Executive Officer of the Corporation, the Chief Executive Officer shall report such problem, abuse, or deficiency to the Board of Directors.

§ 8G. Requirements for Federal entities and designated Federal entities

(a) Notwithstanding section 11 of this Act, as used in this section—

(1) the term "Federal entity" means any Government corporation (within the meaning of section 103(1) of title 5, United States Code), any Government controlled corporation (within the meaning of section 103(2) of such title), or any other entity in the Executive branch of the Government, or any independent regulatory agency, but does not include—

(A) an establishment (as defined under section 11(2) of this Act) or part of an establishment;

(B) a designated Federal entity (as defined under paragraph (2) of this subsection) or part of a designated Federal entity;

(C) the Executive Office of the President;

(D) the Central Intelligence Agency;

(E) the General Accounting Office; or

(F) any entity in the judicial or legislative branches of the Government, including the Administrative Office of the United States Courts and the Architect of the Capitol and any activities under the direction of the Architect of the Capitol;

(2) the term "designated Federal entity" means Amtrak, the Appalachian Regional Commission, the Board of Governors of the Federal Reserve System, the Board for International Broadcasting, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Corporation for Public Broadcasting, the Equal Employment Opportunity Commission, the Farm Credit Administration, the Federal Communications Commission, the Federal Election Commission, the Federal Housing Finance Board, the Federal Labor Relations Authority, the Federal Maritime Commission, the Federal Trade Commission, the Legal Services Corporation, the National Archives and Records Administration, the National Credit Union Administration, the National Endowment for the Arts, the National Endowment for the Humanities, the National Labor Relations Board, the National Science Foundation, the Panama Canal Commission, the Peace Corps, the Pension Benefit Guaranty Corporation, the Securities and Exchange Commission, the Smithsonian Institution, the Tennessee Valley Authority, the United States International Trade Commission, and the United States Postal Service;

(3) the term "head of the Federal entity" means any person or persons designated by statute as the head of a Federal entity, and if no such designation exists, the chief policymaking officer or board of a Federal entity as identified in the list published pursuant to subsection (h)(1) of this section;

(4) the term "head of the designated Federal entity" means any person or persons designated by statute as the head of a designated Federal entity and if no such designation exists, the chief policymaking officer or board of a designated Federal entity as identified in the list published pursuant to subsection (h)(1) of this section, except that—

(A) with respect to the National Science Foundation, such term means the National Science Board; and

(B) with respect to the United States Postal Service, such term means the Governors (within the meaning of section 102(3) of title 39, United States Code);

(5) the term "Office of Inspector General" means an Office of Inspector General of a designated Federal entity; and

(6) the term "Inspector General" means an Inspector General of a designated Federal entity.

(b) No later than 180 days after the date of the enactment of this section [Oct. 18, 1988], there shall be established and maintained in each designated Federal entity an Office of Inspector General. The head of the designated Federal entity shall transfer to such office the offices, units, or other components, and the functions, powers, or duties thereof, that such head determines are properly related to the functions of the Office of Inspector General and would, if so transferred, further the purposes of this section. There shall not be transferred to such office any program operating responsibilities.

(c) Except as provided under subsection (f) of this section, the Inspector General shall be appointed by the head of the designated Federal entity in accordance with the applicable laws and regulations governing appointments within the designated Federal entity.

(d) Each Inspector General shall report to and be under the general supervision of the head of the designated Federal entity, but shall not report to, or be subject to supervision by, any other officer or employee

of such designated Federal entity. The head of the designated Federal entity shall not prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpena during the course of any audit or investigation.

(e) If an Inspector General is removed from office or is transferred to another position or location within a designated Federal entity, the head of the designated Federal entity shall promptly communicate in writing the reasons for any such removal or transfer to both Houses of the Congress.

(f)(1) For purposes of carrying out subsection (c) with respect to the United States Postal Service, the appointment provisions of section 202(e) of title 39, United States Code, shall be applied.

(2) In carrying out the duties and responsibilities specified in this Act, the Inspector General of the United States Postal Service (hereinafter in this subsection referred to as the "Inspector General") shall have oversight responsibility for all activities of the Postal Inspection Service, including any internal investigation performed by the Postal Inspection Service. The Chief Postal Inspector shall promptly report the significant activities being carried out by the Postal Inspection Service to such Inspector General.

(3)[1](A)(i) Notwithstanding subsection (d), the Inspector General shall be under the authority, direction, and control of the Governors with respect to audits or investigations, or the issuance of subpoenas, which require access to sensitive information concerning—

(I) ongoing civil or criminal investigations or proceedings;

(II) undercover operations;

(III) the identity of confidential sources, including protected witnesses;

(IV) intelligence or counterintelligence matters; or

(V) other matters the disclosure of which would constitute a serious threat to national security.

(ii) With respect to the information described under clause (i), the Governors may prohibit the Inspector General from carrying out or completing any audit or investigation, or from issuing any subpoena, after such Inspector General has decided to initiate, carry out, or complete such audit or investigation or to issue such subpoena, if the Governors determine that such prohibition is necessary to prevent the disclosure of any information described under clause (i) or to prevent the significant impairment to the national interests of the United States.

(iii) If the Governors exercise any power under clause (i) or (ii), the Governors shall notify the Inspector General in writing stating the reasons for such exercise. Within 30 days after receipt of any such notice, the Inspector General shall transmit a copy of such notice to the Committee on Governmental Affairs of the Senate and the Committee on Government Reform and Oversight of the House of Representatives, and to other appropriate committees or subcommittees of the Congress.

(B) In carrying out the duties and responsibilities specified in this Act, the Inspector General—

(i) may initiate, conduct and supervise such audits and investigations in the United States Postal Service as the Inspector General considers appropriate; and

(ii) shall give particular regard to the activities of the Postal Inspection Service with a view toward avoiding duplication and insuring effective coordination and cooperation.

(C) Any report required to be transmitted by the Governors to the appropriate committees or subcommittees of the Congress under section 5(d) shall also be transmitted, within the seven-day period specified under such section, to the Committee on Governmental Affairs of the Senate and the Committee on Government Reform and Oversight of the House of Representatives.

(3)[1] Nothing in this Act shall restrict, eliminate, or otherwise adversely affect any of the rights, privileges, or benefits of either employees of the United States Postal Service, or labor organizations representing employees of the United States Postal Service, under chapter 12 of title 39, United States Code, the National Labor Relations Act, any handbook or manual affecting employee labor relations with the United States Postal Service, or any collective bargaining agreement.

(4) As used in this subsection, the term "Governors" has the meaning given such term by section 102(3) of title 39, United States Code.

(g)(1) Sections 4, 5, 6 (other than subsections (a)(7) and (a)(8) thereof), and 7 of this Act shall apply to each Inspector General and Office of Inspector General of a

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[1] So in original. Two pars. (3) were enacted.

designated Federal entity and such sections shall be applied to each designated Federal entity and head of the designated Federal entity (as defined under subsection (a)) by substituting—

(A) "designated Federal entity" for "establishment"; and

(B) "head of the designated Federal entity" for "head of the establishment".

(2) In addition to the other authorities specified in this Act, an Inspector General is authorized to select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers, and duties of the Office of Inspector General and to obtain the temporary or intermittent services of experts or consultants or an organization thereof, subject to the applicable laws and regulations that govern such selections, appointments, and employment, and the obtaining of such services, within the designated Federal entity.

(3) Notwithstanding the last sentence of subsection (d) of this section, the provisions of subsection (a) of section 8C (other than the provisions of subparagraphs (A), (B), (C), and (E) of subsection (a)(1)) shall apply to the Inspector General of the Board of Governors of the Federal Reserve System and the Chairman of the Board of Governors of the Federal Reserve System in the same manner as such provisions apply to the Inspector General of the Department of the Treasury and the Secretary of the Treasury, respectively.

(h)(1) No later than April 30, 1989, and annually thereafter, the Director of the Office of Management and Budget, after consultation with the Comptroller General of the United States, shall publish in the

Federal Register a list of the Federal entities and designated Federal entities and the head of each such entity (as defined under subsection (a) of this section).

(2) Beginning on October 31, 1989, and on October 31 of each succeeding calendar year, the head of each Federal entity (as defined under subsection (a) of this section) shall prepare and transmit to the Director of the Office of Management and Budget and to each House of the Congress a report which—

(A) states whether there has been established in the Federal entity an office that meets the requirements of this section;

(B) specifies the actions taken by the Federal entity otherwise to ensure that audits are conducted of its programs and operations in accordance with the standards for audit of governmental organizations, programs, activities, and functions issued by the Comptroller General of the United States, and includes a list of each audit report completed by a Federal or non-Federal auditor during the reporting period and a summary of any particularly significant findings; and

(C) summarizes any matters relating to the personnel, programs, and operations of the Federal entity referred to prosecutive authorities, including a summary description of any preliminary investigation conducted by or at the request of the Federal entity concerning these matters, and the prosecutions and convictions which have resulted.

§ 8H. Rule of construction of special provisions

The special provisions under section 8, 8A, 8B, 8C, 8D, or 8E of this Act relate only to the establishment named in such section and no inference shall be drawn from the presence or absence of a provision in any such section with respect to an establishment not named in such section or with respect to a designated Federal entity as defined under section 8F(a).

§ 9. Transfer of functions

(a) There shall be transferred—

(1) to the Office of Inspector General—

(A) of the Department of Agriculture, the offices of that department referred to as the "Office of Investigation" and the "Office of Audit";

(B) of the Department of Commerce, the offices of that department referred to as the "Office of Audits" and the "Investigations and Inspections Staff" and that portion of the office referred to as the "Office of Investigations and Security" which has responsibility for investigation of alleged criminal violations and program abuse;

(C) of the Department of Defense, the offices of that department referred to as the "Defense Audit Service" and the "Office of Inspector General, Defense Logistics Agency", and that portion of the office of that department referred to as the "Defense Investigative Service" which has responsibility for the investigation of alleged criminal violations;

(D) of the Department of Education, all functions of the Inspector General of Health, Education, and Welfare or of the Office of Inspector General of Health, Education, and Welfare relating to functions

transferred by section 301 of the Department of Education Organization Act [20 U.S.C.A. 3441];

(E) of the Department of Energy, the Office of Inspector General (as established by section 208 of the Department of Energy Organization Act);

(F) of the Department of Health and Human Services, the Office of Inspector General (as established by title II of Public Law 94-505);

(G) of the Department of Housing and Urban Development, the office of that department referred to as the "Office of Inspector General";

(H) of the Department of the Interior, the office of that department referred to as the "Office of Audit and Investigation";

(I) of the Department of Justice, the offices of that Department referred to as (i) the "Audit Staff, Justice Management Division", (ii) the "Policy and Procedures Branch, Office of the Comptroller, Immigration and Naturalization Service", the "Office of Professional Responsibility, Immigration and Naturalization Service", and the "Office of Program Inspections, Immigration and Naturalization Service", (iii) the "Office of Internal Inspection, United States Marshals Service", (iv) the "Financial Audit Section, Office of Financial Management, Bureau of Prisons" and the "Office of Inspections, Bureau of Prisons", and (v) from the Drug Enforcement Administration, that portion of the "Office of Inspections" which is engaged in internal audit activities, and that portion of the "Office of Planning and Evaluation" which is engaged in program review activities;

(J) of the Department of Labor, the office of that department referred to as the "Office of Special Investigations";

(K) of the Department of Transportation, the offices of that department referred to as the "Office of Investigations and Security" and the "Office of Audit" of the Department, the "Offices of Investigations and Security, Federal Aviation Administration", and "External Audit Divisions, Federal Aviation Administration", the "Investigations Division and the External Audit Division of the Office of Program Review and Investigation, Federal Highway Administration", and the "Office of Program Audits, Urban Mass Transportation Administration";

(L) of the Department of the Treasury, the office of that department referred to as the "Office of Inspector General", and, notwithstanding any other provision of law, that portion of each of the offices of that department referred to as the "Office of Internal Affairs, Bureau of Alcohol, Tobacco, and Firearms", the "Office of Internal Affairs, United States Customs Service", and the "Office of Inspections, United States Secret Service" which is engaged in internal audit activities;

(M) of the Environmental Protection Agency, the offices of that agency referred to as the "Office of Audit" and the "Security and Inspection Division";

(N) of the Federal Emergency Management Agency, the office of that agency referred to as the "Office of Inspector General";

(O) of the General Services Administration, the offices of that agency referred to as the "Office of Audits" and the "Office of Investigations";

(P) of the National Aeronautics and Space Administration, the offices of that agency referred to as the "Management Audit Office" and the "Office of Inspections and Security";

(Q) of the Nuclear Regulatory Commission, the office of that commission referred to as the "Office of Inspector and Auditor";

(R) of the Office of Personnel Management, the offices of that agency referred to as the "Office of Inspector General", the "Insurance Audits Division, Retirement and Insurance Group", and the "Analysis and Evaluation Division, Administration Group";

(S) of the Railroad Retirement Board, the Office of Inspector General (as established by section 23 of the Railroad Retirement Act of 1974);

(T) of the Small Business Administration, the office of that agency referred to as the "Office of Audits and Investigations";

(U) of the Veterans' Administration, the offices of that agency referred to as the "Office of Audits" and the "Office of Investigations"; and[1]

(V) of the Corporation for National and Community Service, the Office of Inspector General of ACTION;[1]

(W) of the Social Security Administration, the functions of the Inspector General of the Department of Health and Human Services which are transferred to the Social Security Administration by the Social Security Independence and Program Improvements

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[1] So in original. The word "and" at end of subpar. (U) probably should appear at end of subpar. (V).

Act of 1994 (other than functions performed pursuant to section 105(a)(2) of such Act), except that such transfers shall be made in accordance with the provisions of such Act and shall not be subject to subsections (b) through (d) of this section; and

(2) such other offices or agencies, or functions, powers, or duties thereof, as the head of the establishment involved may determine are properly related to the functions of the Office and would, if so transferred, further the purposes of this Act,

except that there shall not be transferred to an Inspector General under paragraph (2) program operating responsibilities.

(b) The personnel, assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available or to be made available, of any office or agency the functions, powers, and duties of which are transferred under subsection (a) are hereby transferred to the applicable Office of Inspector General.

(c) Personnel transferred pursuant to subsection (b) shall be transferred in accordance with applicable laws and regulations relating to the transfer of functions except that the classification and compensation of such personnel shall not be reduced for one year after such transfer.

(d) In any case where all the functions, powers, and duties of any office or agency are transferred pursuant to this subsection, such office or agency shall lapse. Any person who, on the effective date of this Act [Oct. 1, 1978], held a position compensated in accordance with the General Schedule, and who, without a break in

service, is appointed in an Office of Inspector General to a position having duties comparable to those performed immediately preceding such appointment shall continue to be compensated in the new position at not less than the rate provided for the previous position, for the duration of service in the new position.

§ 10. Conforming and technical amendments

[Section amended sections 5315 and 5316 of Title 5, Government Organization and Employees, and section 3522 of Title 42, The Public Health and Welfare, which amendments have been executed to text.]

§ 11. Definitions

As used in this Act—

(1) the term "head of the establishment" means the Secretary of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Housing and Urban Development, the Interior, Labor, State, Transportation, or the Treasury; the Attorney General; the Administrator of the Agency for International Development, Environmental Protection, General Services, National Aeronautics and Space, Small Business, or Veterans' Affairs; the Director of the Federal Emergency Management Agency, the Office of Personnel Management or the United States Information Agency; the Chairman of the Nuclear Regulatory Commission or the Railroad Retirement Board; the Chairperson of the Thrift Depositor Protection Oversight Board; the Chief Executive Officer of the Corporation for National and Community Service;;[2] the Administrator of the Community Development Financial Institutions Fund;

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[2] So in original.

and[3] the chief executive officer of the Resolution Trust Corporation; and the Chairperson of the Federal Deposit Insurance Corporation; or the Commissioner of Social Security, Social Security Administration; as the case may be;

(2) the term "establishment" means the Department of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Housing and Urban Development, the Interior, Justice, Labor, State, Transportation, or the Treasury; the Agency for International Development, the Community Development Financial Institutions Fund, the Environmental Protection Agency, the Federal Emergency Management Agency, the General Services Administration, the National Aeronautics and Space Administration, the Nuclear Regulatory Commission, the Office of Personnel Management, the Railroad Retirement Board, the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, the Small Business Administration, the United States Information Agency, the Corporation for National and Community Service,,[1] or[4] the Veterans' Administration, or the Social Security Administration; as the case may be;

(3) the term "Inspector General" means the Inspector General of an establishment;

(4) the term "Office" means the Office of Inspector General of an establishment; and

(5) the term "Federal agency" means an agency as defined in section 552(e) of Title 5 (including an establishment as defined in paragraph (2)), United

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[3] So in original. The word "and" probably should not appear.

[4] So in original. The word "or" probably should not appear.

States Code, but shall not be construed to include the General Accounting Office.

§ 12. Effective date

The provisions of this Act and the amendments made by this Act [see section 10 of this Act] shall take effect October 1, 1978.

(4)

No. 98-369

In the Supreme Court of the United States

OCTOBER TERM, 1998

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, WASHINGTON, D.C., AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, OFFICE OF THE INSPECTOR GENERAL, PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY, AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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QUESTIONS PRESENTED

1. Whether an Office of the Inspector General investigator is properly considered a "representative of the agency" for purposes of the representation rights set forth in 5 U.S.C. 7114(a)(2)(B).

2. Whether the agency headquarters, in this case the National Aeronautics and Space Administration, is responsible for an unfair labor practice committed by the agency's Office of the Inspector General as a result of its non-compliance with 5 U.S.C. 7114(a)(2)(B).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a)[1] is reported at 120 F.3d 1208.[2] The decision and order of

[1] "Pet. App." refers to the Appendix in the petition for a writ of certiorari filed in this case.

[2] The court's denial of the Agency's petition for rehearing and suggestion of rehearing *en banc* is also appended to the petition. Pet. App. 75a-76a.

the Federal Labor Relations Authority (Pet. App. 21a-57a) is reported at 50 FLRA 601.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1997. Pet. App. 1a. A petition for rehearing was denied on March 31, 1998. *Id.* at 76a. On June 22, 1998, Justice Kennedy extended the time for filing a petition for a writ of certiorari to July 29, 1998, and on July 24, 1998, further extended the time for filing to August 28, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101-7135 (1994 & Supp. II 1996), and the Inspector General Act of 1978, 5 U.S.C. App. 3 §§ 1-12 (1994 & Supp. II 1996) are reproduced in the appendix to petitioners' brief. Pet. Br. App. 1a-93a.

STATEMENT

A. Background - The Federal Service Labor-Management Relations Statute

The Federal Service Labor-Management Relations Statute (Statute) governs labor-management relations in the federal service. Under the Statute, the responsibilities of the Federal Labor Relations Authority (Authority) include adjudicating unfair labor practice (ULP) complaints, negotiability disputes, bargaining unit and representational election matters, and resolving exceptions to arbitration awards. *See* 5 U.S.C. 7105(a)(1), (2); *see also Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 93 (1983) (*BATF*). The Authority thus ensures compliance with the statutory rights and obligations of federal employees, labor organizations that represent such federal employees, and federal agencies. The Authority is further empowered to take such actions as are necessary and appropriate to effectively administer the Statute's provisions. *See* 5 U.S.C. 7105(a)(2)(I); *BATF*, 464 U.S. at 92-93.

The Authority performs a role analogous to that of the National Labor Relations Board (NLRB) in the private sector. *See BATF*, 464 U.S. at 92-93. Congress intended the Authority, like the NLRB, "to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the [Statute]." *Id.* at 97.

The Statute makes it a ULP for a federal agency employer to, among other things, "interfere with, restrain, or coerce any employee in the exercise by the employee of any right under [the Statute]," or "otherwise fail or refuse to comply with any provision" of the Statute. 5 U.S.C. 7116(a)(1) and (8). The instant case involves a ULP under section 7116(a)(1) and (8) and concerns the Authority's interpretation of the representational right set forth in section 7114(a)(2)(B) of the Statute.

Section 7114(a)(2)(B) provides that an exclusive representative "shall be given the opportunity to be represented at any examination of an employee in the unit by a representative of the agency in connection with an investigation" if the employee reasonably believes that discipline may result from the examination and the employee requests representation. 5 U.S.C. 7114(a)(2)(B). This statutory provision extends to federal employees the right to union representation

provided in the private sector by the NLRB through its interpretation of the National Labor Relations Act, 29 U.S.C. 151 *et seq.* (1994 & Supp. II 1996) (NLRA), and the Supreme Court's decision in *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975) (*Weingarten*). *See* 124 Cong. Rec. 29,184 (1978), *reprinted in* Subcommittee on Postal Personnel and Modernization of the Committee on Post Office and Civil Service, 96th Cong., 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, at 926 (1979) (*Legis. Hist.*) (Congressman Udall explained that the House bill provisions that led to the enactment of section 7114(a)(2)(B) were intended to reflect the Supreme Court's decision in *Weingarten*); *Internal Revenue Serv., Wash., D.C.* v. *FLRA*, 671 F.2d 560, 563 (D.C. Cir. 1982) (same).

Although representational rights under section 7114(a)(2)(B) and *Weingarten* were intended to be similar, Congress also recognized that the right to representation might evolve differently in the private and federal sectors, and that NLRB decisions would not necessarily be controlling in the federal sector. *See Legis. Hist.* at 824; *U.S. Immigration & Naturalization Serv., N.Y. Dist. Office, N.Y., N.Y.*, 46 FLRA 1210, 1218 (1993) (*INS, N.Y Dist.*), *review denied sub nom. American Fed'n of Gov't Employees* v. *FLRA*, 22 F.3d 1184 (D.C. Cir. 1994). Moreover, in the federal sector the *Weingarten* representation right is expressly codified in the Statute, whereas the same right in the private sector inheres in the employee's guaranteed right to act in concert for mutual aid and protection. *See Weingarten*, 420 U.S. at 256, 260.

In interpreting the statutory representation right set forth in section 7114(a)(2)(B), the Authority has determined that it considers an Office of the Inspector

General (OIG) agent to be a "representative of the agency." Pet. App. 37a, 40a. As such, when a bargaining unit employee properly seeks and is denied union representation in an OIG investigation, section 7114(a)(2)(B) is violated and a ULP has occurred. *See id.* at 48a.

B. The Instant Case

1. Factual Background

This ULP case came before the Authority due to events that occurred at the George C. Marshall Space Flight Center (MSFC), a component of the National Aeronautics and Space Administration, Headquarters (NASA-HQ), located in Huntsville, Alabama. Pet. App. 23a. NASA-HQ is headquartered in Washington, D.C. *Id.* The National Aeronautics and Space Administration, Office of the Inspector General (NASA-OIG), also headquartered in Washington, D.C., has NASA-OIG offices located at MSFC as well as at other NASA-HQ components. *Id.* The NASA-OIG investigators assigned to MSFC are subject to the direction of individuals in the NASA-OIG chain of command and are not under the supervision of any MSFC officials. *Id.* The NASA Inspector General reports to the Administrator of NASA-HQ—the head of the agency. *Id.*

In 1993, NASA-OIG received information from the Federal Bureau of Investigation (FBI) regarding possible illicit activities by an MSFC employee, P.[3] *Id.* P was linked to documents that allegedly posed threats to P's co-workers at MSFC. *Id.* NASA-OIG relayed this information to a NASA-OIG investigator at MSFC. *Id.*

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[3] For confidentiality and other reasons, the employee involved has been referred to as "P." *Id.* n.11.

The NASA-OIG investigator proceeded to conduct an investigation and contacted P to arrange an interview.[4] *Id.* at 23a-24a. P requested that his attorney and a union representative be present during the examination, and the NASA-OIG investigator agreed. *Id.*

The examination took place at the office of P's attorney. *Id.* at 24a. Those present included the NASA-OIG investigator, another NASA-OIG investigator working out of MSFC, P's attorney, and a union representative. *Id.* The NASA-OIG investigator established ground rules for the conduct of the proceeding that provided, among other things, that the union representative was present as a "witness"; that as union representative, he would not be allowed to interrupt the examination; and that the union representative could, in the future, be called as a witness for the government. *Id.* The union representative twice objected to this limitation on his role as union representative and stated that he was attending the interview in order to represent the interests of the union, the bargaining unit, and P. *Id.* The NASA-OIG investigator responded by threatening to cancel the interview and move it elsewhere if the union representative did not "maintain himself" and, at several points during the interrogation, the NASA-OIG investigator challenged the union representative's representational actions. *Id.* at 24a-25a.

NASA-OIG furnished information regarding P to MSFC. *Id.* at 60a. P was thereafter removed from his employment at MSFC. *Id.* at 63a.

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[4] Early in the investigation, the NASA-OIG investigator determined that P had not violated the law, and thus the investigation was administrative and not criminal. *Id.* at 23a- 24a n.12.

2. The Administrative Law Judge's Decision

The complaint in this case, based upon the charge filed by Local 3434 of the American Federation of Government Employees (AFGE)—the exclusive representative of bargaining unit employees at MSFC—alleged that NASA-HQ and NASA-OIG (collectively "petitioners" or the "Agency") violated section 7116(a)(1) and (8) of the Statute by failing to allow the union representative to participate in the examination of P, in contravention of section 7114(a)(2)(B) of the Statute. Pet. App. 22a. A hearing was held before an Administrative Law Judge (ALJ) on the complaint. Pet. App. 59a. The ALJ subsequently issued a decision finding that the NASA-OIG investigator's actions interfered with the union's right to take an active role during an examination of an employee and therefore violated section 7114(a)(2)(B). Pet. App. 25a, 64a, 70a-71a. In making this decision, the ALJ found that the NASA-OIG investigator was a "representative of the agency" within the meaning of section 7114(a)(2)(B). *Id.* at 25a, 64a. The ALJ found that NASA-OIG committed a ULP under section 7116(a)(1) and (8) of the Statute. Pet. App. 26a, 71a. Finding insufficient record evidence to show that NASA-HQ was responsible for the violation, the ALJ recommended that the complaint against NASA-HQ be dismissed. *Id.*

3. The Authority's Decision

In its ULP decision and order, the Authority concluded that the NASA-OIG investigator's actions during the course of the investigation of a bargaining unit employee violated the Statute.[5] *Id.* at 48a. The

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[5] Notwithstanding the fact that the NASA-OIG investigator allowed the union representative to be present during the investigation of the bargaining unit employee, the Authority

Authority also reaffirmed that the NASA-OIG investigator was a "representative of the agency" within the meaning of section 7114(a)(2)(B) of the Statute. *Id.* at 40a. Finally, the Authority found that both NASA-HQ and NASA-OIG were responsible for NASA-OIG's violation of the Statute. *Id.* at 48a-49a. Accordingly, the Authority issued an appropriate remedial order. *Id.* at 52a-53a.

a. The NASA-OIG Investigator Acted as a "Representative of the Agency"

The Authority based its finding that the NASA-OIG investigator was acting as a "representative of the agency," NASA-HQ, on three fundamental conclusions:

> (1) the term "representative of the agency" under section 7114(a)(2)(B) should not be so narrowly construed as to exclude management personnel employed in other subcomponents of the agency; (2) the statutory independence of agency OIGs is not determinative of whether the investigatory interviews implicate section 7114(a)(2)(B) rights; and (3) section 7114(a)(2)(B) and the [Inspector General] Act[6] are not irreconcilable.

Id. at 40a-41a. The Authority reached these conclusions only after extensively analyzing relevant case law.

In *Department of Defense, Defense Criminal Investigative Service; Defense Logistics Agency and*

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concluded that restrictions on the union representative's role prevented his effective representation during the interrogation, and thus violated section 7114(a)(2)(B). *Id.* at 33a. In the court below, this finding was not contested by the Agency. *Id.* at 6a n.4. Accordingly, it will not be addressed further herein.

[6] The statutory scheme governing OIGs is set forth in the Inspector General Act of 1978, 5 U.S.C. App. 3 §§ 1-12 (1994 & Supp. II 1996) (IG Act).

Defense Contract Administration Services Region, New York, 28 FLRA 1145, 1149 (1987) (*DOD, DCIS*), *enforced sub nom. Defense Criminal Investigative Service, Department of Defense* v. *FLRA*, 855 F.2d 93 (3d Cir. 1988) (*DCIS*), the Authority had established that an OIG investigator is considered to be a "representative of the agency" within the meaning of section 7114(a)(2)(B). Pet. App. 37a. Although the Third Circuit affirmed this conclusion in *DCIS*, the D.C. Circuit rejected the Authority's interpretation of section 7114(a)(2)(B) as it pertained to an OIG representative in *United States Department of Justice* v. *FLRA*, 39 F.3d 361, 365 (D.C. Cir. 1994) (*DOJ*). Pet. App. 37a.[7]

In the instant case, the Authority carefully reviewed the factual background and findings in both *DCIS* and *DOJ*, to include both courts' analyses of the statutory language of section 7114(a)(2)(B) as well as the language and legislative history of the IG Act. Pet. App. 37a-40a. After its review of the two cases, the Authority reaffirmed its holding in *DOD, DCIS* and agreed with the Third Circuit's *DCIS* reasoning by concluding that the NASA-OIG investigator was acting as a

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[7] The Fourth Circuit also decided a related case that arose in the context of a negotiability dispute. *United States Nuclear Regulatory Comm'n* v. *FLRA*, 25 F.3d 229 (4th Cir. 1994) (2-1 decision) (*NRC*). The court reviewed and rejected the Authority's determination that an agency was obligated to bargain over four bargaining proposals implicating section 7114(a)(2)(B). *Id.* at 236. The court determined that the bargaining proposals, which defined employee rights and procedures for all investigatory interviews, including those conducted by the OIG, were non-negotiable because they interfered with the OIG's independence as granted by the IG Act. *Id.* at 235. Decided after *DCIS* and before *DOJ*, the *NRC* majority neither criticized nor viewed its decision as inconsistent with *DCIS*; instead, the Fourth Circuit majority viewed the Authority's negotiability determination as an expansion of "the limited holding of [*DCIS*]." *Id.*

"representative of the agency" under section 7114(a)(2)(B). Pet. App. 40a-41a.

The Authority first considered which management personnel are obligated to recognize the section 7114(a)(2)(B) representational right, and concluded, consistent with *DCIS*, that the statutory right is not "dependent upon the organizational entity within the agency to whom the person conducting the examination reports." *Id.* at 41a. As such, the Authority determined that the phrase "representative of the agency" should not be so narrowly construed as to exclude management personnel employed in different components or subcomponents of the agency, such as the OIG.[8] *Id.* at 41a-42a. "If such were the case, agencies could abridge bargaining unit rights and evade statutory responsibilities under section 7114(a)(2)(B), and thus thwart the intent of Congress, by utilizing personnel from other subcomponents (such as the OIG) to conduct investigative interviews of bargaining unit employees." *Id.* n.22.

Next, the Authority analyzed the statutory independence of OIGs, pursuant to the IG Act, and concluded that this independence does not necessarily exempt OIG investigatory examinations from the provisions of section 7114(a)(2)(B). *Id.* at 42a. Although recognizing the OIG's statutory independence, the Authority noted that the independence is not absolute—and becomes nonexistent when the OIG conducts an interview of an employee concerning work-related misconduct and, as in the instant case, reports the findings to the agency for possible disciplinary action. *Id.*

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[8] The Authority observed that it is "clear and unchallenged that NASA is an 'agency' under 5 U.S.C. § 7103(a)(3)." *Id.* at 41a-42a.

The Authority then considered the statutory provisions and legislative histories of section 7114(a)(2)(B) and the IG Act and concluded that the two are not incompatible. *Id.* at 43a. First, the statutory language of the two provisions revealed no inconsistencies. *Id.* at 44a. Second, despite the recognized congressional intent that the OIG be independent from the agency, the Authority found that the purpose of this independence is to insulate the OIG from agency management pressure—not from compliance with federal labor relations requirements. *Id.* at 45a. Third, based upon the limited representational function of a union representative under section 7114(a)(2)(B), and the benefits to the investigatory process that may result from union presence, the Authority determined that compliance with section 7114(a)(2)(B) would not unduly restrain the conduct of OIG investigative interviews. *Id.* at 46a-47a.

Finally, the Authority noted that even if the two statutes conflicted, it found no congressional intent suggesting that either the Statute or the IG Act is preemptive of the other. *Id.* at 47a. Thus, the Authority concluded that the IG Act should not trump the Statute. *Id.* at 48a.

b. NASA-OIG Committed a ULP for which NASA-HQ Was Also Responsible

Because the conduct of the NASA-OIG investigator, as a "representative of the agency," interfered with the rights of employees in another component of the agency, the Authority decided that NASA-OIG violated the Statute. *Id.* The Authority concluded that NASA-OIG was properly held responsible for violating the Statute, notwithstanding the fact that NASA-OIG did not have a collective bargaining relationship with the bargaining

unit in this case. This holding comports with well-established precedent that the Authority will find a statutory violation when a component of an agency infringes upon the protected rights of bargaining unit employees of another component of the same agency. *See Headquarters, Defense Logistics Agency, Washington, D.C.*, 22 FLRA 875, 884 (1986) (*DLA*).[9] Pet. App. 48a.

The Authority disagreed, however, with the ALJ's recommendation to dismiss the complaint against NASA-HQ. *Id.* at 49a. In reviewing the record evidence, the Authority found that NASA-OIG, in its investigative role, represents the interests of NASA-HQ and other NASA-HQ subcomponents. *Id.* at 50a. NASA-OIG shares investigative information with NASA-HQ and NASA-HQ subcomponents, and such information is used as a basis for disciplinary action. *Id.* In addition, the NASA Inspector General reports to, and is under the supervision of, the Administrator of NASA-HQ. *Id.* (citing 5 U.S.C. App. 3 § 3(a)). Based upon these factors, and the Authority precedent applying the *DLA* rationale to the actions of the parent agency and a subcomponent, *see U.S. Dep't of Veterans Affairs, Washington, D.C.*, 48 FLRA 991, 1000-01 (1993) (*DVA*), the Authority found NASA-HQ responsible for a statutory violation based upon its failure to ensure that NASA-OIG comply with the Statute. Pet. App. 50a.[10]

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[9] As the Authority explained, "[t]his concept has its genesis in the private sector." Pet. App. 48a n.26. Even a non-employer has been sanctioned for violating the rights of bargaining unit employees. *See Hudgens* v. *NLRB*, 424 U.S. 507, 510 n.3 (1976); *Austin Co.*, 101 NLRB 1257, 1258-59 (1952). Pet. App. 48a-49a n.26.

[10] The Authority recognized (Pet. App. 51a) that in finding the parent agency liable, it was deviating from its holding in the decision underlying the D.C. Circuit's *DOJ* decision, *U.S. Department of Justice, Washington, D.C. and U.S. Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota and Office of Inspector General, Washington D.C. and Office of Professional Responsibility, Washington, D.C.*, 46 FLRA 1526, 1571 (1993) (*DOJ, Twin Cities*). Based upon its analysis in the instant case, however, the Authority concluded that holding NASA-HQ, as well as NASA-OIG, responsible for the ULP committed by NASA-OIG would effectuate the purposes of the Statute because it is appropriate for agency headquarters to advise OIG personnel of their responsibilities under the Statute. *Id.* at 50a-51a.

4. The Court of Appeals' Decision in the Instant Case

The Eleventh Circuit enforced the Authority's ULP decision and order and denied the Agency's petition for review. Pet. App. 20a. The court agreed with essentially every aspect of the Authority's decision.

Deferring to the Authority's interpretation of the Statute, the court found no error in the Authority's determination that an OIG investigator is a "representative of the agency" under section 7114(a)(2)(B). *Id.* at 9a. NASA-OIG had argued to the court that the rights and duties set forth in section 7114(a)(2)(B) derive from the collective bargaining relationship, of which NASA-OIG is not a part. *Id.* at 8a-9a. However, the Eleventh Circuit, like the Authority and the Third Circuit, rejected this argument. *Id.* at 9a-11a.

The court found that reading such a requirement into section 7114(a)(2)(B) "would undermine Congress's purpose in enacting this section." *Id.* at 10a. Noting that section 7114(a)(2)(B) "focuses on the risk of adverse employment action to the employee," the court concluded that "[b]ecause this risk does not disappear or diminish significantly when an investigator is employed in an agency component that has no collective bargaining relationship with the employee's union, we see no reason

why the protection afforded by Congress should be eliminated in such situations." *Id.* Because the Authority had determined that NASA-OIG performs an investigatory role on behalf of NASA-HQ and its components, the court concluded that the NASA-OIG investigator was a "representative of the agency." *Id.* at 11a.

With regard to the Authority's interpretation of the IG Act, the court did not defer to the Authority, *id.* at 5a, but nevertheless agreed with the Authority's conclusions and its reasoning, *id.* at 12a-15a. The court found nothing in the text or legislative history of the IG Act "to justify exempting OIG investigators from compliance with the federal *Weingarten* provision." *Id.* at 12a.

In considering the congressional intent that OIGs be independent from the agencies they investigate, the court found that "the presence of a union representative at OIG interviews, as mandated by federal statute," is not the "type of interference from which Congress sought to insulate OIG investigators." *Id.* at 14a. The court explained that it did not foresee a union representative hindering an OIG agent's investigative process. *Id.* It thus concluded that compliance with section 7114(a)(2)(B) is not "sufficiently inconsistent with the IG Act to justify an implied exemption for OIG investigators." *Id.* at 15a. Without such a conflict, the court could not justify ruling that the IG Act "impliedly" repealed section 7114(a)(2)(B). *Id.* (citing *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974) (*Morton*)). Therefore, the court concluded that NASA-OIG committed a ULP because the NASA-OIG investigator was a "representative of the agency" within the meaning of section 7114(a)(2)(B) and the investigator's conduct was in violation of the Statute. *Id.*

After finding that NASA-OIG violated the Statute, the court then agreed with the Authority's

determination that NASA-HQ, as parent agency for NASA-OIG, was also responsible for the section 7114(a)(2)(B) violation. *Id.* at 19a. The court acknowledged the Authority's holdings finding a parent agency responsible for a statutory violation by a subcomponent of the agency. *Id.* at 18a.

The court analyzed the Authority's finding that, because NASA-HQ "failed to ensure that NASA-OIG complied with § 7114(a)(2)(B)," it was guilty of a ULP. *Id.* Although the court recognized NASA-OIG's role as an "'independent and objective' unit" of NASA-HQ, pursuant to 5 U.S.C. App. 3 § 2, it also recognized that NASA-OIG "is subject to the general supervision of the agency head." *Id.* at 19a. Moreover, the court highlighted the fact that the NASA-OIG investigator "ordered the employee to answer questions or face dismissal," and this suggested that the NASA-OIG investigator was acting on behalf of NASA-HQ. *Id.* at 19a. The court therefore found no error in the Authority's determination. *Id.*[11]

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[11] Subsequent to the Eleventh Circuit's decision in this case, the Second Circuit issued a decision in a factually analogous case. *FLRA* v. *U.S. Dep't of Justice, Washington, D.C., U.S. Dep't of Justice, Immigration and Naturalization Serv., New York Dist., N.Y. and Dep't of Justice, Office of the Inspector General, Washington, D.C.*, 137 F.3d 683 (2d Cir. 1998) (*DOJ, INS*), *petition for cert. filed*, 67 U.S.L.W. 3302 (Oct. 22, 1998) (No. 98-667). The Second Circuit agreed with the Authority, and the Third and Eleventh Circuits, that the "agency" within the meaning of section 7114(a)(2)(B) includes the agency headquarters. 137 F.3d at 689. With regard to whether an OIG investigator is a "representative of the agency," the court diverged from all prior court and Authority decisions. It concluded that an OIG investigator is a "representative of the agency" when conducting an interrogation "traditionally performed by agency supervisory staff," but not when questioning an employee for "bona fide purposes" under the IG Act. *Id.* at 686, 690.

SUMMARY OF ARGUMENT

I. The Authority correctly held that the NASA-OIG investigator was a "representative of the agency" within the meaning of section 7114(a)(2)(B) of the Statute. The Authority's determination on this point, which is consistent with the language and purpose of the Statute, is entitled to deference because it rests upon a reasonable interpretation of the Statute administered by the Authority.

Section 7114(a)(2)(B) codifies important representational rights for federal sector employees that correspond to the rights private sector employees enjoy under this Court's *Weingarten* decision. These rights are triggered during investigative interviews conducted by a "representative of the agency" when a bargaining unit employee reasonably fears disciplinary action.

It is undisputed in this case that a bargaining unit employee, who reasonably feared discipline, was denied effective union representation during an interrogation by a NASA-OIG investigator. It is also clear that based on information gathered by the OIG investigator, the employee was subsequently disciplined by his superiors at MSFC, a component of NASA-HQ. Further, there is no question that NASA-HQ is an "agency," as defined in the Statute. The inquiry here concerns only whether the NASA-OIG investigator should be considered a "representative of the agency" for the purposes of section 7114(a)(2)(B).

The Authority has determined that the phrase "representative of the agency" should not be so narrowly construed as to exclude management personnel, such as the OIG, who are located in other components of the agency. Nothing in the Statute's language contradicts the Authority's determination in this regard, and a conclusion to the contrary would

permit agencies to circumvent protected rights by utilizing personnel from other subcomponents of the agency to conduct investigative interviews of bargaining unit employees.

This logical interpretation of the Statute has been affirmed by the Third Circuit and the court below. These courts have noted that such an interpretation of the Statute is justified given the purposes of section 7114(a)(2)(B), its focus on the risk of discipline, and the fact that the results of such interrogations, as in this case, are routinely shared with the agency entity capable of disciplining the employee interviewed.

Petitioners assert that rights under section 7114(a)(2) apply only to the management entity that engages in collective bargaining with the union at issue and note in this regard that NASA-OIG and NASA-HQ have no direct collective bargaining relationship with the unit representing the employee in this case. Petitioners claim that the Authority has interpreted the phrase "representative of the agency" in a manner that is inconsistent with both the language and purposes of the Statute and in a manner inconsistent with the way in which the *Weingarten* case has been interpreted in the private sector. Both of these assertions are incorrect.

The language of the Statute, the policies behind section 7114(a)(2)(B), and pertinent case law directly contradict petitioners' argument that section 7114(a)(2)(B) rights apply only to the management entity that engages in collective bargaining with the union at issue. The express language of section 7114(a)(2)(B) in no way restricts the phrase "representative of the agency" to those acting directly for the management entity engaged in the collective bargaining relationship with the union. To the contrary, and as the Third Circuit noted, section 7114(a)(2)'s

express reference to the terms "bargaining unit" and "agency" support the Authority's broader interpretation of the Statute. Further, the policy reasons supporting the protection of bargaining unit employees' section 7114(a)(2) rights are directly implicated regardless of whether the agency official involved is assigned to the management entity having a collective bargaining relationship with the unit. Finally, neither the Authority's case law, nor judicial precedent interpreting the same, requires the existence of a collective bargaining relationship between the agency official and the bargaining unit employee as a necessary element for compliance with the requirements of the Statute.

Nor has the *Weingarten* decision been interpreted as being restricted to the collective bargaining relationship. Significantly, both the National Labor Relations Board and the United States Court of Appeals for the District of Columbia have concluded that the *Weingarten* right is properly applied in investigations by United States Postal Service Postal Inspectors, who serve under the auspices of the IG Act, when conducting investigations of alleged criminal activity by bargaining unit employees. *Weingarten*'s progeny establish that the core of the *Weingarten* right is the concern about the risk to the employee of disciplinary action because of the employee's participation in the interview. The Authority's case-specific determinations of the section 7114(a)(2)(B) right are consistent with *Weingarten*.

Petitioners assert that the representational requirements of section 7114(a)(2)(B), as interpreted by the Authority, conflict with the independence granted the OIG by the IG Act. However, as the Authority, the Third Circuit, and the court below have noted, nothing in the IG Act justifies exempting OIG investigators from

the requirements of section 7114(a)(2)(B). Rather, the legislative history of the IG Act reveals that the purpose of the OIG's independence is to insulate the OIG from agency management pressure, not to insulate the OIG from compliance with the federal labor relations laws.

Petitioners fail to point to any specific provision of the IG Act in conflict with the requirement of affording *Weingarten* protection to bargaining unit employees when interviewed by OIGs. Indeed, petitioners acknowledge that employees are entitled to attorney representation during OIG interviews. Given this Court's *Morton* v. *Mancari* principle that the proper course is to give effect to both laws while preserving each law's sense and purpose, the Authority's reconciliation of the two statutes is correct.

II. The Authority's determination that NASA-HQ is responsible, along with NASA-OIG, for the violation of the representation rights involved here is consistent with its finding that the NASA-OIG investigator was a "representative of the agency" within the meaning of section 7114(a)(2)(B). NASA-OIG ultimately answers to and is under the general supervision of NASA-HQ, which failed to ensure that its OIG complied with the Statute's requirements. Holding NASA-HQ responsible for the actions of NASA-OIG in these circumstances effectuates the purpose of the Statute and comports with Authority precedent.

ARGUMENT

I. An Office of the Inspector General Investigator Is Properly Considered a "Representative of the Agency" Within the Meaning of 5 U.S.C. 7114(a)(2)(B)

A. The Authority's Interpretation of the Statute Is Consistent with the Language and Purpose of the Statute and Is Entitled to Deference

At issue in this case is the proper interpretation and application of section 7114(a)(2)(B) of the Statute. The statutory language of section 7114(a)(2)(B) provides specific representational rights to bargaining unit employees and their exclusive representatives: "[a]n exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at . . . any examination of an employee in the unit by a representative of the agency in connection with an investigation" if the employee reasonably believes that discipline may result from the examination and the employee requests representation. 5 U.S.C. 7114(a)(2)(B).

Although the phrase "representative of the agency" is not specifically defined in the Statute, one of its key words—"agency"—is broadly defined as "an Executive agency." 5 U.S.C. 7103(a)(3). It is undisputed, as it was before the Authority, that NASA-HQ "is an 'agency' under 5 U.S.C. 7103(a)(3)." Pet. App. 42a.[12] Given this

[12] This finding was affirmed by the court below, and also is supported by the decisions of the Second and Third Circuits. *See* Pet. App. 9a; *DOJ, INS*, 137 F.3d at 689; *DCIS*, 855 F.2d at 98. In addition, in *DOJ*, the D.C. Circuit found that the parent agency, the Department of Justice (DOJ), is an agency within the meaning of 5 U.S.C. 7103(a)(3), but because the Authority had dismissed DOJ from the case, the D.C. Circuit focused on whether the OIG could be the "agency" under both sections 7103(a)(3) and 7114(a)(2)(B). *See* 39 F.3d at 365-66.

controlling and expansive definition of "agency," the only remaining appropriate inquiry, therefore, is who is a "representative" of NASA-HQ in this case. The Authority's conclusion that the word "representative," or phrase "representative of the agency," includes management personnel in other subcomponents of the "agency" is entirely consistent with the language of the Statute. In this regard, nothing in the Statute suggests that an individual in the employ of either the agency's headquarters or of another component of an agency is entitled to ignore provisions in the Statute when dealing with bargaining unit employees. Additionally, this construction is consistent with the purpose and intent of Congress in enacting section 7114(a)(2)(B) of the Statute.

Congress intended through section 7114(a)(2)(B) for federal employees to enjoy the same rights available to private sector employees under *Weingarten* when they "are called upon to provide information that exposes them to the risk of disciplinary action." Pet. App. 41a; *see DCIS*, 855 F.2d at 99. When, as in this case, the interrogation is being conducted by an entity within the "agency" which shares information obtained as a result of the interrogation with the agency component for which the employee works, the risk of disciplinary action and attendant need for representation are evident. As expressed by the Third Circuit in *DCIS*, it is unlikely "that Congress intended that union representation be denied to the employee solely because the management representative is employed outside the bargaining unit." 855 F.2d at 99.

The Authority observed that a conclusion to the

contrary would allow agencies to circumvent bargaining unit rights and evade section 7114(a)(2)(B) responsibilities by utilizing personnel from other subcomponents to conduct investigative interviews of bargaining unit employees. *Id.* Indeed, the facts of this case support the reality of such circumvention of the section 7114(a)(2)(B) responsibilities, because the record shows that NASA-OIG investigators regularly provided the information obtained through investigations to NASA-HQ and MSFC for disciplinary action. Pet. App. 50a.

Thus the Authority, exercising its discretion and expertise to interpret its own organic statute, *see* 5 U.S.C. 7105(a)(2)(I), *BATF*, 464 U.S. at 92-93, properly determined that "representative of the agency" in section 7114(a)(2)(B) "should not be so narrowly construed as to exclude management personnel employed in other subcomponents of the agency." Pet. App. 40a-41a. Where, as here, the Authority is directed to interpret the Statute that it is charged with implementing, its conclusions are reviewed under the standard set forth in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*). *See Fort Stewart Schs.* v. *FLRA*, 495 U.S. 641, 644-45 (1990) (*Fort Stewart*); *see also* 5 U.S.C. 7105. Under *Chevron*, if the relevant statutory language is clear, the Court "must give effect to the unambiguously expressed intent of Congress." *Fort Stewart*, 495 U.S. at 645 (citing *Chevron*, 467 U.S. at 842-43). If, on the other hand, the relevant statutory provisions are "silent or ambiguous" on the point at issue, the Court should affirm the Authority's conclusions if they are based on a "permissible construction of the [S]tatute." *Id.* As intended, the Authority "exercise[d] its 'special function of applying the general provisions of the [Statute] to the

complexities' of federal labor relations." *BATF*, 464 U.S. at 97 (citation omitted).

B. Petitioners' Focus on the Collective Bargaining Relationship Has No Foundation in the Statute or in Case Law and Is Inconsistent With the Intent of the Statute

As argued unsuccessfully to the Authority, as well as to the Second, Third, and Eleventh Circuits,[13] petitioners assert that the phrase "representative of the agency" in section 7114(a)(2)(B) refers only to those in the employ of the "management entity that has a collective bargaining relationship with a union." Pet. Br. 18. Under petitioners' interpretation of the phrase, no agency official outside of the agency entity at the level of exclusive recognition, including management personnel from an agency headquarters or in any other agency component, is a "representative of the agency." In support of their collective bargaining relationship claim, petitioners make two assertions, both of which are false: first, the collective bargaining relationship is a determinative factor in all section 7114 rights and in the definition of collective bargaining (5 U.S.C. 7103(a)(12)); and second, limiting the section 7114(a)(2)(B) right to disciplinary interviews conducted by the management entity that has a collective bargaining relationship is consistent with the *Weingarten* case and the manner in which the *Weingarten* right has evolved in the private sector. Neither of these arguments finds support in the Statute or established precedent. Furthermore, limiting the term "representative of the agency" to only those individuals assigned to the entity having a collective bargaining relationship with the union—MSFC in this

[13] *See* Pet. App. 42a; *DOJ, INS*, 137 F.3d at 690; *DCIS*, 855 F.2d at 99; Pet. App. 9a.

case—not only undermines the purpose of the Statute, but would also permit agencies to elude statutory responsibilities.

1. Neither the Statute nor Case Law Restricts Statutory Rights Based upon the Collective Bargaining Relationship in the Manner Suggested by Petitioners

Contrary to petitioners' claim, the existence of a collective bargaining relationship is not a prerequisite for the invocation of protected rights under section 7114(a)(2) of the Statute. Put differently, the absence of a collective bargaining relationship covering an agency official and a bargaining unit employee is not a defense to what would otherwise be a violation of section 7114(a)(2) of the Statute. The statutory provisions referenced by petitioners that include, in effect, the phrase "representative of the agency"—sections 7114(a)(2)(A),[14] 7114(a)(2)(B), and section 7103(a)(12)—contain no language restricting established, protected rights to the collective bargaining relationship. Moreover, neither the Authority nor reviewing courts have so narrowly interpreted these statutory provisions. Indeed, if such were the case, meaningful protected

[14] Section 7114(a)(2)(A) provides that a union is entitled to representation at any formal discussion or meeting "between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment." In determining whether such a meeting is a formal discussion, the Authority considers numerous factors, including whether the individual who held the meeting is a "first-level supervisor or is higher in the management hierarchy" and "whether any other management representative attended." *See Marine Corps Logistics Base, Barstow, Cal.*, 45 FLRA 1332, 1335 (1992).

rights could be easily avoided and enforced only in an arbitrary manner.

To begin, the language of section 7114(a)(2) does not support petitioners' assertion. As the *DCIS* court noted, section 7114(a)(2) "makes express reference to the bargaining unit and appears to distinguish [the bargaining unit] from the 'agency.'" 855 F.2d at 99. The Third Circuit explained that in reference to "formal discussions" in section 7114(a)(2)(A) and "examination" in section 7114(a)(2)(B), the Statute refers to the "union as the 'exclusive representative of an appropriate unit' and to the employee as the 'employee in the unit.'" *Id.* In contrast, the Statute characterizes "management's representative as a 'representative of the agency.'" *Id.* Accordingly, and contrary to petitioners' argument, it is entirely consistent with the wording of the Statute to conclude that an employee in a bargaining unit is entitled to the rights enunciated in section 7114(a)(2) so long as the person conducting the formal discussion or interview is a "representative of the agency"—irrespective of where the conducting official and the bargaining unit employee are employed within the agency's organization.

Review of the Authority's case law interpreting section 7114(a)(2) rights demonstrates that the existence of a collective bargaining relationship is unnecessary to effectuate the rights outlined therein. *See Department of Veterans Affairs, Veterans Affairs Med. Ctr., Jackson, Miss.*, 48 FLRA 787, 793 (1993) (*VAMC, Miss.*) ("the rights contained in section 7114(a)(2)(B) are not tied to collective bargaining"), *reconsideration granted and rev'd on other grounds*, 49 FLRA 171 (1994). Furthermore, although not at issue in this case, other rights established in section 7114 are not dependent upon the collective bargaining relationship. *See U.S. Dep't of Veterans Affairs,*

Washington, D.C., Veterans Admin. Med. Ctr., Amarillo, Tex., 42 FLRA 333, 341, 342 (1991) (although VA employees have no rights under the Statute to engage in collective bargaining, they are fully protected in the exercise, through their exclusive representative, of other rights under the Statute, including the right to representation under section 7114(a)(2)(A)), *enforcement denied on other grounds, U.S. Dep't of Veterans Affairs, Washington, D.C., Veterans Admin. Med. Ctr., Amarillo, Tex.* v. *FLRA*, 1 F.3d 19 (D.C. Cir. 1993).

In fact, the Authority has squarely rejected the collective bargaining theory espoused by petitioners. For example, the Authority has found a violation of section 7114 when a higher echelon agency official improperly bypassed an exclusive representative and communicated directly with a bargaining unit employee concerning a grievance. *Department of Health & Human Servs., Social Sec. Admin., Baltimore, Md. and Social Sec. Admin., Region X, Seattle, Wash.*, 39 FLRA 298, 311-12 (1991) ((1) rejecting agency's contention that because the Regional Personnel Officer was part of an entity that "d[id] not have a bargaining relationship with the Union at the regional level," he therefore was not required to comply with the Statute and (2) finding the agency responsible for the Regional Personnel Officer's acts notwithstanding the Officer's organizational location). This rejection is in accord with the Authority's case law providing that "when higher-level management directs or requires management at a subordinate level to act in a manner that is inconsistent with the subordinate level's bargaining obligations under the Statute, the higher level entity violates" the Statute. *Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio and Ogden Air Logistics Ctr., Hill Air Force Base, Utah*, 46 FLRA 1184, 1186 (1993).

With regard to section 7114(a)(2)(A), the formal discussion provision, the collective bargaining relationship is immaterial to the Authority's determination of who is a "representative of the agency." *See Veterans Admin. Med. Ctr., Long Beach, Cal.*, 41 FLRA 1370, 1389-90 (1991) (interview of local, bargaining unit employee by attorney in agency's Office of District Counsel is a formal discussion under the Statute), *aff'd sub nom. Department of Veterans Affairs Med. Ctr.* v. *FLRA*, 16 F.3d 1526 (9th Cir. 1994). Even an outside private contractor has been held to be a "representative of the agency" for purposes of section 7114(a)(2)(A). *Defense Logistics Agency, Defense Depot Tracy, Tracy, Cal.*, 39 FLRA 999, 1001, 1013 (1991).

Nor is the "representative of an agency" referred to in section 7103(a)(12)'s definition of collective bargaining restricted to the management entity in the collective bargaining relationship with the union. Rather, the "representative" of that entity for bargaining purposes depends on whom the entity designates as its representative. It is axiomatic that an agency entity has the discretion to designate anyone it chooses to serve as its bargaining representative. *See American Fed'n of Gov't Employees and U.S. Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 4 FLRA 272, 274 (1980).

Finally, if the existence of a collective bargaining relationship between the agency official and the bargaining unit employee involved were the *sine qua non* petitioners claim it to be, section 7114 rights could be easily avoided through the simple stratagem of using an agency official from higher headquarters or another agency component to conduct formal discussions or interrogations. Rather than inquiring into the circumstances surrounding a formal discussion with or an interrogation of a bargaining unit employee, the

Authority would be obliged to examine an agency's organizational hierarchy to determine whether the agency official involved was under the direct authority of the management entity having a collective bargaining relationship with the bargaining unit. Such a rule would improperly premise violations of protected rights on the organizational entity to which the agency official was assigned—a result not remotely suggested in the Statute nor in any precedent interpreting it. As the Third Circuit noted, "we would have some difficulty understanding an interpretation of the [S]tatute limiting 'agency' to the subdivision comprising the collective bargaining unit and excluding 'representatives' of management that are employed in higher echelons of an 'Executive department.'" *DCIS*, 855 F.2d at 99.

2. Neither the Weingarten Case Nor the Manner in Which It Has Evolved Restricts the Representation Right Based upon a Collective Bargaining Relationship

Petitioners assert that the Authority's interpretation of section 7114(a)(2)(B) is inconsistent with the *Weingarten* decision and the manner in which the representation right has evolved in the private sector. According to petitioners, the *Weingarten* right arose out of the need to balance the power between the parties to collective bargaining, and absent a collective bargaining relationship between NASA-OIG and the bargaining unit, the power imbalance does not arise. Pet. Br. 20. However, petitioners' arguments are not supported by *Weingarten* itself or relevant private sector case law.

What this Court actually said in *Weingarten* is that the *NLRA* itself is intended to eliminate the "'inequality of bargaining power between employees . . . and employers.'" 420 U.S. at 262 (citation omitted). In light

of this statutory intent, and based upon the section 7 rights of the NLRA, bargaining unit employees and their representatives are entitled to representation at disciplinary interviews. *Id.* The heart of the *Weingarten* right, and thus section 7114(a)(2)(B), as noted by the Authority and the Eleventh and Third Circuits, is the "risk of adverse employment action to the employee" (Pet. App. 10a) and the right to union representation in that situation. *See* Pet. App. 41a; *DCIS*, 855 F.2d at 99.

As their primary example of how the private sector limits the *Weingarten* right to the existence of a collective bargaining relationship, petitioners assert that "when an entity other than management, such as a law enforcement officer, interviews a bargaining unit employee who might subsequently face discipline as a result of information obtained in the interview, the employee has no right to the presence of a union representative." Pet. Br. 21-22. Petitioners' argument is directly at odds with relevant holdings of the NLRB and the United States Court of Appeals for the District of Columbia.

The NLRB has long held that United States Postal Service (USPS) employees are entitled to *Weingarten* representation when interviewed by Postal Inspectors. *See United States Postal Serv. and Eddie L. Jenkins*, 241 NLRB 141 (1979) (*Jenkins*). Postal Inspectors, like OIG investigators, are employees of the parent agency, *see United States Postal Serv.* v. *NLRB*, 969 F.2d 1064, 1066 (D.C. Cir. 1992) (opinion by then-Judge Ginsburg) (*USPS*), but "are not under the supervision or direction of postal supervisors or managers," *United States Postal Serv. and Ralph Bell*, 288 NLRB 864 (1988).

In *Jenkins*, because the employees were administratively disciplined as a result of the Postal Inspector investigations, the NLRB concluded that not

allowing employees the *Weingarten* right in such situations would "in effect . . . nullify[] the *Weingarten* rights of any Postal Service employee who might be administratively disciplined as the result of a criminal investigation." *Jenkins*, 241 NLRB at 142. Finding the risk of disciplinary action to be the primary concern addressed by *Weingarten*, and not simply the elimination of inequality in bargaining power, the NLRB held that denying the *Weingarten* right in such situations would be "clearly repugnant to the historical development by the Board of the principle, approved by the Supreme Court in *Weingarten*, that Section 7 creates a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline." *Id.*

In sum, petitioners' arguments regarding the limitations on the breadth of the phrase "representative of the agency," which, of course, are not entitled to deference, find no support in either the Statute or applicable case law. The Authority's interpretation, which *is* entitled to deference, is consistent with both the language of the Statute as well as public and private sector case law. As the Third Circuit observed in *DCIS*, "[s]uch interpretation is exactly the sort of task that the [Authority] is meant to perform with respect to the [Statute] and has here accomplished." 855 F.2d at 100.

C. Interpreting the Phrase "Representative of the Agency" to Include OIG Investigators Does Not Conflict with the IG Act or OIG Investigative Functions

Before reaching its decision in the case *sub judice*, the Authority carefully analyzed both the statutory language and legislative history of the IG Act to ensure that the IG Act did not conflict with the obligations set

forth by Congress in section 7114(a)(2)(B). Pet. App. 41a-47a. Though recognizing the OIG's independence, the Authority pointed out that the OIG's autonomy is not absolute, particularly when OIGs conduct interviews that trigger employees' section 7114(a)(2)(B) rights. *Id.* at 42a. The Eleventh Circuit affirmed the Authority's determination that notwithstanding the NASA-OIG's statutory independence from NASA-HQ, the NASA-OIG investigator acted as a "representative of the agency" under section 7114(a)(2)(B). As the court recognized, "nothing in the text or legislative history of the IG Act . . . justif[ies] exempting OIG investigators from compliance with the federal *Weingarten* provision." Pet. App. 12a.

Consistent with the Authority and the Eleventh Circuit, the *DCIS* court explained that the term "'representative' should be construed with reference to the objective of the [S]tatute," not based upon the independence of the OIG. 855 F.2d at 100. OIG investigators are employees of the agency. *Id.* When an OIG investigator conducts an interview in order "to solicit information concerning possible misconduct of [agency] employees in connection with their work," and the information discovered may be provided to the supervisors in the affected subcomponent of the agency to be utilized for agency purposes, the OIG investigator is a "representative" of the agency. *Id.*

As shown below, petitioners' argument that the IG Act establishes that the OIG operates independently of the agency is overbroad and "unsupported by [its] text and legislative history." *Id.* at 98.

1. Review of the Statutory Language and Legislative History of the IG Act and the Language of Section 7114(a)(2)(B) Reveals that the Provisions Do Not Conflict

a. Statutory Language

Examination of the provisions of the IG Act reveals no conflict with the Statute, in general, or with section 7114(a)(2)(B), in particular. As recognized by the court below, "[n]o provision of the IG Act suggests that Congress intended to excuse OIG investigators from honoring otherwise applicable federal statutes," such as section 7114(a)(2)(B). Pet. App. 12a. Further, although the IG Act grants NASA-OIG a degree of independence from NASA-HQ, it also provides for NASA-OIG involvement in meeting agency objectives and in no way prohibits OIG cooperation with the agency.[15]

As detailed in the Authority's decision (Pet. App. 44a), under section 2(1) of the IG Act, the investigations and audits that NASA-OIG is authorized to conduct and supervise are focused entirely on NASA-HQ's programs and operations. 5 U.S.C. App. 3 § 2(1). Section 2(2) sets forth NASA-OIG's leadership role in promoting the "economy, efficiency, and effectiveness" of, and in

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[15] Eleanor Hill, Vice-Chair of the organization of presidentially appointed Inspectors General, notes in the Inspector General community's journal that the Department of Defense Inspector General has, over the past 5 years, "participated in over 100 management process action teams, integrated process teams and working groups that have been the Department's principal means of generating new ideas for reforms and process improvement." Eleanor Hill, *A Message from the PCIE Vice-Chair*, The Journal of Public Integrity, Fall/Winter 1998, at 5. Such coordination undercuts petitioners' overbroad claim that the OIG is prohibited from involvement in "the policy and programmatic functions of agency management." Pet. Br. 31.

preventing fraud and abuse in, NASA-HQ's programs and operations. 5 U.S.C. App. 3 § 2(2). Section 2(3) expands this theme by enabling the Administrator of NASA-HQ, through NASA-OIG, to continue to be "fully and currently informed about [agency] problems and deficiencies . . . and the necessity for and progress of corrective action" by NASA-HQ. 5 U.S.C. App. 3 § 2(3). Rather than establish absolute autonomy, these statutory provisions reveal that NASA-OIG routinely represents and safeguards NASA-HQ's interests, as it does when it investigates the actions of Agency employees.

b. Legislative History

The goal of Congress in creating the OIGs was "'to more effectively combat fraud, abuse, waste and mismanagement in the programs and operations' of certain specified federal agencies." Pet. App. 12a (quoting S.Rep. No. 95-1071 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2676 (*IG Legis. History*)). To ensure accomplishment of this goal, "Congress believed it necessary to grant OIGs a significant degree of independence from the agencies they were charged with investigating." *Id.* That is, some amount of independence was "necessary to prevent agency managers from covering up wrongdoing within their agencies in order to protect their personal reputations and the reputations of their agencies." Pet. App. 13a; *see DCIS*, 855 F.2d at 98 (OIG independence intended to "insulate Inspector Generals from agency management which might attempt to cover up its own fraud, waste, ineffectiveness, or abuse."); Pet. App. 45a.

Although the OIG is an independent and objective unit, 5 U.S.C. App. 3 § 2, the OIG's independence from the agency is not unlimited. For example, despite being

given access to agency documents and personnel pursuant to 5 U.S.C. App. 3 § 6(a)(1) and (3), the OIG's access is limited to that necessary "to do an effective job, subject, of course, *to the provisions of other statutes*, such as the Privacy Act." *IG Legis. History* at 2709 (emphasis added). Also, the OIG's power to select and employ personnel necessary to conduct its business is "subject, of course, to the limits imposed by appropriations." *Id.* at 2710.

As both the Eleventh and Third Circuits have noted, the congressional intent to insulate OIGs from interference by agency management is not frustrated by an employee's exercise during an interview of the rights protected by section 7114(a)(2)(B). "We do not believe that the presence of a union representative at OIG interviews, as mandated by federal statute, creates the type of interference from which Congress sought to insulate OIG investigators." Pet. App. 14a; *see DCIS*, 855 F.2d at 98. Certainly the degree of intended independence is not so clearly set forth in either the statutory language or the legislative history so as to justify the creation of an "exemption" from section 7114(a)(2)(B) for OIG investigators. *See* Pet. App. 15a; *DCIS*, 855 F.2d at 100.

In summary, given the lack of any express statutory language in the IG Act or indication in the legislative history that compliance with section 7114(a)(2)(B) would improperly interfere with the OIG's intended independence, section 7114(a)(2)(B) and the IG Act should be interpreted in a manner that gives effect to both laws while preserving each law's sense and purpose. *See, e.g., Morton*, 417 U.S. at 551 ("it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each [statute] as effective"). This is the course followed by

the court below, which recognized that "absent a discernible present conflict between the IG Act and [section] 7114(a)(2)(B), we refuse to read the IG Act to have impliedly repealed . . . section [7114(a)(2)(B)] of the [Statute]." Pet. App. 15a (citing *Morton*, 417 U.S. at 551).

2. Compliance with Section 7114(a)(2)(B) Does Not Unduly Restrain the Conduct of OIG Investigations

Petitioners argue that NASA-OIG's independence from agency management, established by the IG Act, prevents an OIG agent from being a "representative of the agency." In support of this assertion petitioners list (Pet. Br. 25-33) numerous examples of the OIG's independent statutory functions.[16] But petitioners fail to establish how the Authority's interpretation of this congressionally established rule threatens the OIG's ability to fulfill its independent obligations.

For example, without supporting authority, petitioners suggest that the duty to report to the Attorney General, and the confidentiality associated therewith, would be compromised by attendance of union representatives at OIG interviews. Petitioners do

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[16] Among these examples, petitioners note the OIG's prohibition "from performing the policy and programmatic functions of agency management," focusing particularly on their inability to discipline employees. Pet. Br. 31-32. They contend that this inability to discipline a NASA-HQ or component employee renders *Weingarten* inapplicable. Pet. Br. 33. However, in the analogous case of Postal Inspectors, the D.C. Circuit and the NLRB have determined the *Weingarten* right to be triggered when information gathered by the investigator is routinely turned over to management for possible disciplinary action. *See USPS*, 969 F.2d at 1072; *Jenkins*, 241 NLRB at 142.

not explain how, in fact, the presence of the union representative would interfere with this reporting obligation, nor do they point to any across-the-board provision in the IG Act establishing this "confidentiality" duty. Further, compliance with section 7114(a)(2)(B) does not compromise any OIG duty to notify the Attorney General of suspected criminal violations. Pet. App. 46a. Instead, as the Authority noted in agreement with this Court's *Weingarten* determination, the presence of a union representative, who could clarify facts or offer other pertinent information, would assist an investigation. *Id.* Such assistance, in turn, could lead to more thorough reporting by the OIG.

Similarly, the presence of a union representative in an OIG interview provides no apparent obstacle to fulfillment of the congressional reporting requirements, nor have petitioners provided any such example. In addition, as the Authority observed, the IG Act's congressional reporting requirements actually should alleviate OIG concerns because the IG Act thus provides a forum through which OIGs may report *if* the presence of union representatives during the interview of bargaining unit employees poses significant problems for OIG investigators. Pet. App. 47a-48a n.25.

The OIG's claimed inability to perform its statutory function if a union representative is present during investigative interviews is further undermined by petitioners' acknowledgment (Pet. Br. 34) that an employee enjoys the right to the presence of an attorney during an OIG interrogation. This acknowledgment causes petitioners two significant problems. First, the right to counsel, like the federal *Weingarten* right, is grounded in statute: "[a] person compelled to appear in person before an agency or *representative thereof* is entitled to be accompanied, represented, and advised by counsel." 5 U.S.C. 555(b) (1994) (emphasis added); *see*

Pet. App. 14a (Eleventh Circuit recognized 5 U.S.C. 555(b) right to counsel). As a result, petitioners find themselves in the inconsistent position of conceding that OIGs are the "representative" of the agency for the purposes of 5 U.S.C. 555(b), but not for the purposes of 5 U.S.C. 7114(a)(2)(B).

Second, and as the Eleventh Circuit noted, it is not apparent "how the right of an employee to be represented by a union representative presents a significantly greater interference with OIG interviews than the existing right of an employee to be represented . . . by an attorney." Pet. App. 14a. In response, petitioners attempt to distinguish an attorney, based on the attorney's duty of loyalty to the client, from a union representative, who might choose to share information concerning the interview with other members of the bargaining unit. Petitioners thus assert that union representatives pose a greater threat to confidentiality. Pet. Br. 34. But petitioners' assertions are both unsupported and inaccurate. Petitioners fail to identify any ethical or legal restriction that would preclude an attorney from subsequently sharing with others the matters about which the attorney's client was questioned in the presence of the third party OIG investigator. As for union representatives, on the other hand, the Authority has interposed no objection to the negotiation of bargaining agreement proposals requiring confidentiality by bargaining unit employees and their representatives concerning information discussed during section 7114(a)(2)(B) interviews. *See American Fed'n of Gov't Employees, Fed. Prison Council 33 and U.S. Dep't of Justice, Fed. Bureau of Prisons*, 51 FLRA 1112, 1117-1118 (1996).[17]

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[17] Moreover, the Authority has followed private sector precedent and ruled that on a showing of "'special circumstances,'" an agency

Finally, petitioners' own arguments contradict the OIG's supposed total independence from agency management. As explained in note 18 of their brief (Pet. Br. 31 n.18), OIGs rely upon agency management to threaten administrative discipline in order to compel an employee's attendance and testimony at an IG interrogation. Such cooperation and coordination between the agency and the OIG in the process of interrogating bargaining unit employees refutes both the agency's lack of involvement and the OIG's independence.

In sum, petitioners have not demonstrated how the obligation of OIG investigators to comply with section 7114(a)(2)(B) poses any realistic threat to the IG Act's requirements. Having failed to establish any direct inconsistency between the IG Act and the Statute, petitioners attack the manner in which the Authority has defined the role of the union representative and raise the specter of criminal and emergency situations. Neither of these efforts advances petitioners' cause.

a. The Authority's Interpretation of the Union Representative's Role

According to petitioners, the role of the union representative, as construed by the Authority, will "impose[] major restrictions on the OIG's freedom to investigate" (Pet. Br. 34) because the Authority has broadly expanded the role of the *Weingarten* representative. *Id.* at 35-36. However, as noted by the Eleventh Circuit, such doomsday predictions are belied by petitioners' failure to cite even one instance where

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is entitled to "preclude a particular individual from serving as the union's designated representative." *Federal Bureau of Prisons, Office of Internal Affairs, Washington, D.C.*, 54 FLRA (No. 133) 1502, 1512 (1998) (citation omitted).

the active participation of a representative has interfered with an OIG investigation. Pet. App. 14a.

To be sure, the Authority has recognized that the purposes underlying section 7114(a)(2)(B)'s codification of the *Weingarten* right can only be achieved by allowing a union representative to take an active role in assisting an employee during an investigatory interview. *See United States Dep't of Justice, Bureau of Prisons, Safford, Ariz.*, 35 FLRA 431, 440 (1990). However, this right is not without limitations. In *Weingarten*, the Supreme Court established that the union representative's presence "need not transform the interview into an adversary contest." 420 U.S. at 263. At the same time, the Court recognized that "[a] knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview." *Id.* at 263. The Authority's case law is consistent with this theme. *See Federal Aviation Admin., New England Region, Burlington, Mass.*, 35 FLRA 645, 652 (1990) (*FAA*).

Contrary to petitioners' claims, the Authority has recognized limits on a union representative's participation in section 7114(a)(2)(B) examinations. *See, e.g., American Fed'n of Gov't Employees, Nat'l Immigration & Naturalization Serv. Council and U.S. Dep't of Justice, Immigration & Naturalization Serv.*, 8 FLRA 347, 363-64 (1982) (a union representative does not have the right to make a recording of an investigatory interview), *rev'd on other grounds, United States Dep't of Justice, Immigration & Naturalization Serv.* v. *FLRA*, 709 F.2d 724 (D.C. Cir. 1983); *INS, N.Y. Dist.*, 46 FLRA at 1223 (agency need not postpone an investigatory interview until such time as preferred union officials are available to represent); *Federal*

Prison Sys., Fed. Correctional Inst., Petersburg, Va., 25 FLRA 210, 228 (1987) (a union representative may be rejected by management in order to preserve the integrity of the investigation).

Petitioners mischaracterize Authority precedent in support of their assertion that the right to union representation will unduly interfere with investigations. Pet. Br. 35. For example, petitioners claim that according to *DOJ, Twin Cities*, 46 FLRA at 1553-1555, 1565-1569, a union representative has the "right to halt the examination and to step outside the hearing of investigators." Pet. Br. 35. On the contrary, the ruling in that case was that "[t]here is no indication in the record that a brief conference between the Union representative and the employee outside the hearing of the investigator would have been unduly disruptive, would have interfered with the objective of the examination, or would have compromised the integrity of the investigation." 46 FLRA at 1569. In a subsequent decision, the Authority clarified that there is no *per se* right for an employee and a union representative to confer privately outside the interview room during a *Weingarten* examination. *See Bureau of Prisons, Office of Internal Affairs, Washington, D.C. and Phoenix, Ariz.*, 52 FLRA 421, 434 (1996).

As another example, petitioners overstate problems associated with the Authority's recognition of the right of the employee and union representative to consult prior to questioning, as established in *FAA*, 35 FLRA at 652-54. Contrary to petitioners' assertion, the consultation right advances the purposes of *Weingarten* as has been recognized by the D.C. Circuit and the NLRB in the Postal Inspector context. *See USPS*, 969 F.2d at 1072, *affirming United States Postal Serv. and American Postal Workers Union, East Bay Area Local*, 303 NLRB 463 (1991).

In asserting that the Authority's representation rights case law would allow union representatives to unduly interfere with OIG investigations, petitioners argue that union representatives "could do what the agency head cannot do—direct and limit how the Inspector General conducts an investigation."[18] Pet. Br. 35; *see* 5 U.S.C. App. 3 § 3(a) (agency head may not "prevent or prohibit" OIG investigations). As noted above, petitioners have yet to provide an example of union representation interfering in an OIG investigation. Indeed, it is difficult to envision how the presence of a union representative at an interview would "prevent or prohibit" an OIG investigation, 5 U.S.C. App. 3 § 3(a). How the presence of a union representative equates to the agency head's interference in an OIG investigation is likewise unclear.

Petitioners also raise objections to the OIG's status as "representative of the agency" based upon the OIG's supposed law enforcement authority, claiming that the Authority has conceded that law enforcement entities are exempt from the coverage of section 7114(a)(2)(B) (Pet. Br. 24, 42) and noting that OIGs may be involved with joint investigations with such law enforcement agencies. Neither of these arguments suggests that the Authority's rule, as developed to date, should be rejected. As a threshold matter, the only across-the-board law enforcement authority set forth in the IG Act is the responsibility in 5 U.S.C. App. 3 § 4(d), to report to the Attorney General violations of federal criminal law.[19]

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[18] It should be noted that the IG Act limits only the agency head's ability to "prevent or prohibit" an OIG investigation (5 U.S.C. App. 3 § 3(a)), not the agency head's ability to work cooperatively with the OIG to ensure that fraud and abuse in the agency are eliminated and prevented. For example, nothing in the IG Act would preclude an agency head from suggesting that certain matters or employees be investigated.

In any event, and contrary to petitioners' assertion, the Authority has not conceded as a general matter that law enforcement entities are exempt from section 7114(a)(2)(B) coverage.[20] Rather, in the instant case, the Authority acknowledged that the FBI, for example, has statutory authority to "'investigate any violation of title 18 involving Government officers and employees—(1) *notwithstanding any other provision of law.*'" Pet. App. 43a n.23 (quoting 28 U.S.C. 535(a)). Moreover, the Authority also made clear that its decision "should not be construed as suggesting that [the Authority] would conclude in all circumstances that every employee of each subcomponent of agencies having government-wide, law-enforcement responsibilities, such as the Department of Justice, is a 'representative of the agency' for the purposes of section 7114(a)(2)(B)." *Id.* The Authority noted that such cases might well be distinguishable from the case at bar. *Id.*

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[19] *See* Vicky L. Powell, *Why Isn't Law Enforcement Authority in the Inspector General Act?*, The Journal of Public Inquiry, Spring/Summer 1998, at 33.

[20] Nor have the NLRB and D.C. Circuit exempted law enforcement entities from *Weingarten* coverage. Postal Inspectors, for example, "serve . . . as federal law enforcement officers, with authority to carry weapons, make arrests, and enforce postal and other laws of the United States." *USPS*, 969 F.2d at 1066 (citing 18 U.S.C. 3061). Notwithstanding Postal Inspectors' status as federal law enforcement officers and their coverage under the IG Act, employees interrogated by Postal Inspectors have a right to union representation at such an investigation under *Weingarten*. *See Jenkins*, 241 NLRB at 142. The NLRB rejected USPS concerns that extending *Weingarten* provisions to investigations by Postal Inspectors would interfere with "legitimate employer prerogatives" and create public safety issues. *Id.; see also USPS*, 969 F.2d at 1072 ("[W]e uphold as reasonable the NLRB's judgment that neither 'public safety' nor 'legitimate employer prerogatives' necessitate the suggested exemption of Inspector interviews, and the attendant 'sacrifice' of the statutory right of postal employees.")

The Authority's above-referenced, self-imposed limitation on the breadth of its decision herein also addresses petitioners' concern about joint investigations. If, unlike the case at hand, an investigation were criminal, rather than administrative, and again unlike this case, conducted in coordination with a law enforcement agency, rather than solely by NASA-OIG, the Authority, and in turn a United States Court of Appeals, could determine whether the *Weingarten* right should apply. The fact that petitioners can envision circumstances involving OIGs where the *Weingarten* right might be inappropriate does not, however, lead to the conclusion that it should be denied in all instances involving OIGs. The Authority has pointedly signaled that there may be circumstances where the questioner is not a "representative of the agency." *Id.* Such specific determinations are better left to the administrative expertise of the Authority and case-by-case adjudication, especially given this Court's "practice of deciding only 'concrete legal issues, presented in actual cases.'" *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 65 n.11 (1989) (quoting *United Pub. Workers of America* v. *Mitchell*, 330 U.S. 75, 89 (1947)).

Finally, petitioners reference the Authority's determination that parties may negotiate representation rights beyond those provided in section 7114(a)(2)(B). *See American Fed'n of State, County, & Mun. Employees, Local 3097 and United States Dep't of Justice, Justice Management Div.*, 42 FLRA 412, 435 (1991). Petitioners argue that this ruling subjects the representational rights to expansion. Although their point is correct, petitioners ignore the statutory recourse options that exist when they are dissatisfied with an Authority decision regarding OIG investigations. First, pursuant to 5 U.S.C. 7123, such

decisions are subject to judicial review and a court of appeals can disagree with the Authority's determinations. This option was pursued successfully by the agency in *NRC*. 25 F.3d 229. Second, and as noted earlier, because the IG Act requires an agency Inspector General to report semiannually to Congress on, among other things, "significant problems . . . relating to the administration of programs and operations," 5 U.S.C. App. 3 § 5(a)(1), an Inspector General could report any significant problems resulting from compliance with section 7114(a)(2)(B) directly to Congress.

Rather than support petitioners' assertions, precedent demonstrates that the Authority has adhered to the Court's teachings in *Weingarten* and carefully balanced the employer's right to interview its employees with the employee's right to be represented. Instead of pronouncing across-the-board rules for circumstances not before it, the Authority has wisely indicated that it will decide specific section 7114(a)(2)(B) scenarios based on the facts of the cases if, and as, they arise. Avenues are available to challenge Authority determinations that allegedly interfere with OIG statutory responsibilities.

b. Criminal Investigations and Emergency Situations

Petitioners argue that the Authority's ruling could improperly implicate the section 7114(a)(2)(B) right in a case involving criminal or emergency situations. Pet. Br. 37. Doubtless there will be investigations involving criminal activity, because virtually any workplace matter being investigated involves conduct that could be characterized as a crime. For example, an altercation between two employees could be criminal assault; missing property or inventory shortages could be larceny or embezzlement; or drug use in the workplace

could be possession of contraband. In fact, the employee interviewed in the *Weingarten* case was suspected of theft. 420 U.S. at 254-55. In any event, the "*Weingarten* protections have been consistently accorded to private sector employees suspected of criminal conduct." *USPS*, 969 F.2d at 1071-72; *see also Department of the Treasury, Internal Revenue Serv., Jacksonville Dist. and Dep't of the Treasury, Internal Revenue Serv., Southeast Reg'l Office of Inspection*, 23 FLRA 876 (1986).

With regard to petitioners' claim that the OIG will be hindered in emergency circumstances, it should be noted that the Authority has not considered the applicability of section 7114(a)(2)(B) in an emergency situation. As stated earlier, however, the Authority *has* determined that an agency is not obligated under the Statute to postpone an investigatory interview until a particular union representative is available. *See INS, N.Y.*, 46 FLRA at 1223. In addition, pursuant to section 7106(a)(2)(D), agencies have the statutory right to "take whatever actions may be necessary to carry out the agency mission during emergencies."

In sum, petitioners have failed to demonstrate that compliance with section 7114(a)(2)(B) will cause undue restraint on the OIG, particularly to any degree actually prohibited by the IG Act. As stated in *DCIS*, "[g]iven the limited function of a *Weingarten* representative, it is conceivable to us that Congress might conclude that the employee's interest in representation outweighs the limited interference that his or her representative's presence might occasion" in OIG interviews. 855 F.2d at 101.

II. NASA-HQ, in Addition to NASA-OIG, Is Properly Responsible for the ULP Committed by NASA-OIG

The Authority properly found that NASA-HQ violated section 7114(a)(2)(B) and, therefore, committed a ULP in violation of section 7116(a)(1) and (8) of the Statute. The Eleventh Circuit, deferring to the Authority, properly upheld this determination.

Contrary to petitioners' argument that the court below misconstrued the IG Act (Pet. Br. 46), the IG Act clearly states that NASA-OIG is "under the general supervision of the [agency] head." 5 U.S.C. App. 3 § 3(a). Although NASA-HQ may not prevent NASA-OIG from initiating, carrying out, or completing an audit or investigation, *id.*, the IG Act gives no indication that an agency head is prohibited from directing the OIG to comply with a federal statute.

As the Authority held in *DOD, DCIS*, it is appropriate for the agency headquarters with administrative responsibility for the OIG to advise Inspectors General "of the pertinent rights and obligations established by Congress in enacting the [Statute]. More particularly, . . . investigators should be advised that they may not engage in conduct which unlawfully interferes with the rights of employees under the Statute." 28 FLRA at 1151. Holding NASA-HQ responsible for NASA-OIG's violation of section 7114(a)(2)(B) fulfills the purposes of section 7114(a)(2)(B).

In this regard, the Authority has long held that "when a component of an agency engages in conduct which unlawfully interferes with the protected rights of employees of another component," as did NASA-OIG in this case, "a violation of section 7116(a)(1) of the Statute will be found to have occurred." *DLA*, 22 FLRA at

884.[21] This concept has also been applied to sanction a parent agency that did not have a collective bargaining relationship with the union, as with NASA-HQ, for violations of the Statute based upon actions involving a subcomponent's responsibilities under the Statute. *See DVA*, 48 FLRA at 1000-01; *Headquarters, U.S. Air Force, Washington, D.C. and 375th Combat Support Group, Scott Air Force Base, Ill.*, 44 FLRA 117, 125 (1992), *review denied sub nom. Headquarters, U.S. Air Force, Washington, D.C.* v. *FLRA*, 10 F.3d 13 (D.C. Cir. 1993) (without opinion).

In affirming the Authority's determination, the Eleventh Circuit recognized that "[i]n conducting investigations within the agency, NASA-OIG serves the interest of NASA-HQ by soliciting information of possible misconduct committed by NASA employees." Pet. App. 19a. Particularly persuasive to the court as indicative of NASA-OIG's actions on behalf of NASA-HQ was "[t]he fact that the NASA-OIG agent in this case ordered the employee to answer questions or face dismissal." *Id.*[22] Accordingly, the court found "no clear error in the Authority's determination that NASA-HQ should be held responsible for the investigator's violation of [section] 7114(a)(2)(B)." *Id.* The Authority urges the Court to reach the same determination.

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[21] As explained at note 9 *supra*, this concept had its genesis in the private sector.

[22] As noted earlier (see p.38 *supra*), petitioners acknowledge this cooperation between the agency and its OIG in compelling employees to participate in OIG investigations. Pet. Br. 31 n.18.

CONCLUSION

The judgment of the court of appeals should be affirmed.[23]

Respectfully submitted.

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* Counsel of Record

JANUARY 1999

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[23] The Solicitor General authorized the filing of this brief and directed the Authority to include the following statement:

I authorize the filing of this brief. Seth P. Waxman, Solicitor General.

No. 98-369

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, WASHINGTON, D.C., AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION OFFICE OF THE INSPECTOR GENERAL,
Petitioners,

v.

FEDERAL LABOR RELATIONS AUTHORITY AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENT AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

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BRIEF FOR RESPONDENT AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

STATEMENT OF THE CASE

This case arose out of an investigation into the conduct of an employee of the George C. Marshall Space Flight Center, a National Aeronautics and Space Administration ("NASA") facility. Pet. App. 2a. The investigation was conducted by the NASA Office of the Inspector General ("NASA-OIG") on the basis of information provided by the Federal Bureau of Investigation indicating that the employee under investigation had threatened and made plans to comimt violence against several co-workers. *Id.*

The employee under investigation worked in a bargaining unit that is represented by the American Federation of Government Employees ("AFGE"). Pet. App. 3a. When the NASA-OIG investigator summoned the employee to an investigatory interview, the employee requested both union assistance pursuant to § 7114(a)(2)(B) of the Federal Sector Labor Management Relations Statute ("FSLMRS"), 5 U.S.C. § 7114(a)(2)(B), and legal assistance pursuant to 5 U.S.C. § 555(b). *Id.* The investigator complied with these requests and arranged for the interview to take place at the office of the employee's attorney with a union representative present. *Id.*

At the beginning of the interview, the NASA-OIG investigator stated certain ground rules. Pet. App. 3a. One such ground rule was that the employee would face dismissal from employment if he refused to answer any of the investigator's questions. *Id.* at 3a n.2. Another ground rule was that the union representative was present only as a witness and could not interrupt questions or answers *Id.* at 3a. The union representative objected to these ground rules, but the interview proceeded. *Id.* On a number of occasions during the examination, the NASA-OIG investigator challenged the efforts of the union representative to assist the employee. *Id.*

Acting on charges filed by AFGE Local 3434, the General Counsel of the Federal Labor Relations Authority ("FLRA") issued a complaint alleging that NASA and the NASA-OIG had violated FSLMRS § 7114(a)(2)(B) by interfering with the union's representation of the employee at the examination. Pet. App. 3a-4a. The FLRA found merit to this complaint and ordered NASA and the NASA-OIG to cease and desist from violating that provision. *Id.* at 4a. The FLRA further directed NASA to post appropriate notice forms and to direct the NASA-OIG to comply with the requirements of FSLMRS § 7114(a)(2)(B) in conducting investigatory examinations. *Id.*

The FLRA petitioned for enforcement of its order. Pet. App. 4a. NASA and the NASA-OIG petitioned for review. *Id.* Acting on these cross-petitions, the United States Court of Appeals for the Eleventh Circuit enforced the FLRA order and denied the petition for review. *Id.* at 20a.

SUMMARY OF ARGUMENT

I. In this case, the Federal Labor Relations Authority ruled that a NASA Office of the Inspector General investigator was acting as a "representative of the agency," within the meaning of § 7114(a)(2)(B) of the Federal Sector Labor Management Relations Statute ("FSLMRS"), when the investigator conducted an examination of a NASA employee. The FLRA's construction of the FSLMRS is consistent with the statute's language and with its legislative history.

A. NASA is unquestionably an "agency" by virtue of being an independent establishment within the Executive branch. And, given the statutory definition of "agency," it is clear that no subpart of NASA can be an "agency" within the statutory meaning of that term. Thus, with respect to an examination of one NASA employee by another NASA employee (the NASA-OIG investigator) it is clear that NASA is the pertinent "agency" for FSLMRS § 7114(a)(2)(B) purposes. And, this is so regardless of whether the examined employee is employed in a different subpart of NASA than the examining employee.

The term "representative" is not defined in the FSLMRS. Rather, the statute uses the term "representative" in a variety of contexts to refer to a person acting on behalf of an agency, labor organization, bargaining unit, or individual employee. From the various contexts in which the term "representative" appears, it is apparent that the FSLMRS uses this term—in accordance with normal usage—to designate someone who is acting for and on behalf of someone else.

In conducting the employee examination in question here, the NASA-OIG investigator was acting as a repre-

sentative of NASA. The NASA-OIG investigator is an employee of NASA charged with undertaking investigations of NASA's operations—including investigations into personnel misconduct—for the purpose of reporting to the head of NASA. Consistent with these responsibilities, the investigator's purpose in conducting the examination in question here was to gather information for NASA's use in conducting that agency's operations. And, the investigator invoked NASA's authority as employer by threatening the employee with discipline if he refused to participate in the examination.

B. The legislative history of FSLMRS § 7114(a)(2)(B) reinforces the plain meaning of the statutory language and demonstrates that the FLRA was correct in construing this provision as applying to the examination conducted by the NASA-OIG investigator.

Congress's stated purpose in enacting § 7114(a)(2)(B) was to grant federal employees a right to union representation at investigatory interviews of the same kind as private sector employees already enjoyed under *NLRB v. J. Weingarten,* 420 U.S. 251 (1975). In *Weingarten* itself, as in a number of NLRB decisions applying the *Weingarten* rule prior to the enactment of the FSLMRS, the investigatory interview in question was carried out by a security specialist employed by a separate security division within the employer. And, the fact that the persons conducting such interviews were security specialists unfamiliar to the interviewed employee was cited by the NLRB as creating a special need for union representation in this context.

The FSLMRS Congress was, moreover, aware of the existence of special investigative divisions within Federal agencies, and proponents of extending *Weingarten* rights to Federal employees cited examinations by such securty specialists in arguing that Federal employees needed protection similar to that given private sector employees.

Given the NLRA law applying *Weingarten* to interviews conducted by security specialists and given the FSLMRS Congress's attention to federal security specialists, the FLRA clearly acted within its authority when it read FSLMRS § 7114(a)(2)(B) in accordance with its plain meaning as covering interviews of agency employees conducted by the agency's OIG. Indeed, post-*Weingarten* decisions of the National Labor Relations Board have recognized that employees of the U.S. Postal Service are entitled to request union representation when called into interviews by Postal Inspectors, who are law enforcement officers employed in a separate Postal Service investigatory devision.

C. NASA's contrary reading of FSLMRS § 7114(a)(2)(B) contradicts the statutory language and thwarts the legislative intent.

NASA suggests that the pertinent "agency" for purposes of identifying a "representative of the agency" within the meaning of FSLMRS § 7114(a)(2)(B) is the subpart of the agency engaged directly in collective bargaining with the interviewed employee's union. This suggestion is belied by the statutory definition of the term "agency," which precludes treating a subpart of an agency as itself an agency.

NASA also suggests that the word "representative" has a special meaning in the FSLMRS and denotes someone who acts under the control of agency management for the purpose of engaging in collective bargaining. And, based on this peculiar reading of the term "representative," NASA argues that an OIG investigator cannot be a "representative of the agency," because the OIG investigator neither engages in collective bargaining nor operates under the control of agency management. The diverse contexts in which the FSLMRS speaks of various parties having "representatives" demonstrates that the term "representative" is not restricted to a collective bargaining representative. And, there is nothing in the statute indicating that

a "representative of the agency" has to be under the control of agency management. In any event, NASA clearly had the authority to prevent the statutory violation here by directing the NASA-OIG to comply with the FSLMRS and by acting in its own capacity as the employer to provide NASA employees with the choice of not participating in an OIG interview where union representation has been denied.

II. The FLRA's construction of FSLMRS § 7114(a)(2)(B) does not bring that statute into conflict with the Inspector General Act. The two conflicts asserted by NASA—that the presence of a union representative interferes with the OIG's duty of confidentiality and restricts the OIG investigator's freedom to investigate—are entirely insubstantial. With respect to the first alleged conflict, NASA has failed to demonstrate that an OIG interview is confidential in law or in fact. With respect to the second alleged conflict, NASA acknowledges that it can point to no actual example of a union representative's presence interfering with the conduct of an OIG examination, and NASA's vague concerns over how the FLRA might expand the representation right do not establish any concrete risk of interference.

ARGUMENT

Section 7114(a)(2)(B) of the Federal Service Labor-Management Relations Statute ("FSLMRS" or "Federal Labor Statute") provides:

> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—
>
> (B) any examination . . . by a representative of the agency in connection with an investigation if—
>
> (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

> (ii) the employee requests representation. [5 U.S.C. § 7114(a)(2)(B).]

This case concerns the application of this provision to the examination of an employee of the National Aeronautics and Space Administration ("NASA" or "Administration") by an investigator on the staff of the NASA Office of the Inspector General ("NASA-OIG"). Pet. App. 22a.[1] As the case comes to this Court, the sole question presented is

> whether the Federal Labor Relations Authority properly concluded that an investigator from an agency's Office of the Inspector General is a "representative of the agency" within the meaning of § 7114(a)(2)(B). [Pet. App. 2a (abbrev. omitted).]

The answer to that question is that the FLRA's conclusion *is* proper. The FLRA "has long held that an OIG investigator can, under certain circumstances, be a 'representative of the agency' within the meaning of section 7114(a)(2)(B) of the Statute." Pet. App. 37a. And, in the circumstances of this case, the Authority held that an OIG investigator is acting as a "representative of the agency" when the investigator compels an agency employee to participate in an examination, on threat of discipline, which examination could reasonably be thought to result in disciplinary action by the agency against its em-

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[1] The NASA employee was allowed to have a union representative present at the examination. However, the investigator interfered with the representative's attempts to confer with the employee during the examination. And, the Federal Labor Relations Authority ("FLRA") found that, by reason of the investigator's denial of effective representation, NASA and the NASA-OIG violated the employee's rights under FSLMRS § 7114(a)(2)(B). Pet. App. 48a-49a. Before the FLRA, NASA's principal defense was that the Administration had complied with § 7114(a)(2)(B) by allowing a union representative to be present. Pet. App. 28a-37a. In the court of appeals, however, the focus of the case shifted to whether federal employees have *any* right to union representation in the context of an examination by an OIG investigator. Pet. App. 6a-15a.

ployee. *Id.* at 41a-43a. In both its general understanding of the statutory language and in its application of the Federal Labor Statute here, the FLRA is entirely correct.

In the opinion below, the FLRA, in addition, gave careful consideration to whether the requirements of FSLMRS § 7114(a)(2)(B) conflict with the requirements of the Inspector General Act ("IGA") governing the functions of the NASA-OIG. Having "examined the language of both statutes and their legislative histories and considered the interrelationship between these two enactments," the Authority concluded that there is no such conflict. Pet. App. 43a. *See id.* 44a-47a.

Following the analytical framework of the decisions below, we first show that the FLRA's reading of FSLMRS § 7114(a)(2)(B) is " 'a permissible contruction of the statute.' " *Fort Stewart Schools v. FLRA*, 495 U.S. 641, 645 (1990), quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). We then show that the FLRA correctly determined that FSLMRS § 7114(a)(2)(B), as construed by the Authority, is not in conflict with the Inspector General Act.[2]

I. THE FLRA PROPERLY CONCLUDED THAT THE NASA-OIG INVESTIGATOR ACTED AS A "REPRESENTATIVE OF THE AGENCY" WITHIN THE MEANING OF FSLMRS § 7114(a)(2)(B).

A. The Statutory Language.

In construing a statute, the "starting point must be the language employed by Congress." *American Tobacco*

[2] The court below described the appropriate "bifurcated review of the Authority's decision in this case" as follows:

> We will review with deference the Authority's interpretation of § 7114(a)(2)(B) and will uphold its conclusions with respect to this section as long as they are reasonable and defensible. We will determine independently, however, whether the Authority's construction of this section of its own statute impermissibly conflicts with another federal statute, namely the Inspector General Act of 1978. [Pet. App. 5a-6a (citations omitted).]

Co. v. Patterson, 456 U.S. 63, 68 (1982). And, as Judge Newman of the Seond Circuit has noted, whether the statutory phrase "representative of the agency" in FSLMRS § 7114(a)(2)(B) encompasses an OIG investigator "raise[s] two issues: (a) what entity is the pertinent 'agency' and (b) is an OIG agent a 'representative' of the pertinent 'agency?' " *FLRA v. U.S. Department of Justice*, 137 F.3d 683, 688 (2d Cir. 1998) pet. for cert. filed, No. 98-667 (Oct. 22, 1998). In this case, the FLRA determined that NASA is the pertinent "agency" and that the investigator for NASA-OIG examining the NASA employee was a "representative of the agency [*viz.* NASA]." Pet. App. 37a-43a. Both of these determinations are dictated by the plain language of the statute.

1. *NASA is the Pertinent "Agency."*

The FSLMRS does not leave any doubt as to the meaning of the term "agency" as that term is used in the statute.

The "Definitions" provision of the FSLMRS states that —with certain exceptions not pertinent here—" 'agency' means an Executive agency." 5 U.S.C. § 7103(a)(3).

"Executive agency," in its turn, is also a defined term. Section 105 of title 5—the title containing the FSLMRS—states: "For the purposes of this title, 'Executive agency' means an Executive department, a Government corporation, and an independent establishment." 5 U.S.C. § 105. The terms "Executive department," and "Government corporation," therein are defined by listing the particular federal government entities that fall within each category. 5 U.S.C. §§ 101 & 103. And, "independent establishment" is defined through a process of negation as "an establishment in the executive branch . . . which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment." 5 U.S.C. § 104.

Defining the term "agency" by reference to the title 5 definition of "Executive agency" is not unique to the

FSLMRS. *See, e.g.*, 5 U.S.C. § 5721(1)(A) (" 'agency' means—an Executive agency"). And, that definition in its terms connotes a deliberate choice by Congress to treat only the agency *as a whole* as the statutory "agency" and to exclude any possibility that a subpart of the parent might also be considered an "agency" within the statutory meaning of that term.

As we have noted above, "Executive agency" is defined to include *only* certain specified "Executive departments" and "Government corporation[s]," 5 U.S.C. §§ 101 & 103. "Independent establishment" is then defined to *exclude* "an[y] Executive department, military department, Government corporation, or *part thereof*, or *part of* an independent establishment." 5 U.S.C.§ 104 (emphasis added). And, when Congress means to define "agency" in a manner which permits subparts of the agency to be considered an agency for the purposes at hand, the Legislature employs a different locution. *See* 5 U.S.C. § 551(1) (" 'agency' means each authority of the Government of the United States").

Fitting these interdependent statutory definitions together, we see the following whole: NASA is an independent administration "headed by an Administrator, who shall be appointed from civilian life by the President by and with the advice and consent of the Senate," and who exercises his authority "[u]nder the supervision and direction of the President." 42 U.S.C. § 2472(a). And, NASA is *not* among the entities listed in the definitions of "Executive departments," 5 U.S.C. § 101, "military departments," 5 U.S.C. § 102, and "Government corporation," 5 U.S.C. § 103. Thus, NASA *is* an "independent establishment" within the executive branch, and, as such, *is* a § 105 "Executive agency," and, hence, an FSLMRS § 7103(a)(3) "agency." It follows, too, that by defining "agency" as it did in the FSLMRS, Congress intended to treat the "agency" as a whole—here NASA—as the employer and to *not* treat subparts of the agency as separate employers.

This understanding of the FSLMRS is reinforced by the distinction between an "agency" and the subparts of an "agency" made repeatedly throughout the statute. *See e.g.*, 5 U.S.C. §§ 7112(a) ("the appropriate unit should be established on an agency, plant, installation, functional, or other basis"), 7112(d) ("[t]wo or more units which are in an agency"), 7113(a) ("If, in connection with any agency, no labor organization has been accorded exclusive recognition on an agency basis"), § 7114(a)(4) ("Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate"), 7117(a)(3) ("any rule or regulation issued by any agency or issued by any primary national subdivision of such agency").

By the plain words of the statute, then, "NASA is an 'agency' under 5 U.S.C. § 7103(a)(3)." Pet. App. 42a. *See also id.* at 9a. It is equally plain that NASA is *the* "pertinent agency" for purposes of determining who is a "representative of the agency" under § 7114(a)(2)(B). *Id.* at 8a-9a.

Not surprisingly then, the FLRA's approach to identifying the pertinent agency for FSLMRS § 7114(a)(2)(B) purposes has been sustained by the Second and Third Circuits as well as by the Eleventh Circuit in this case, Pet. App. 8a-10a. *See FLRA v. U.S. Department of Justice*, 137 F.3d at 688-690; *Defense Criminal Investigative Service v. FLRA*, 855 F.2d 93, 98-99 (3d Cir. 1988).

2. *The NASA-OIG Investigator Acted as a Representative of NASA in Conducting the Interview in Question.*

In contrast to the term "agency," the term "representative" is not defined in the FSLMRS. Rather, in a variety of settings, the term "representative" is employed in the FSLMRS to designate a person who acts for and on behalf of a labor organization, a federal agency, or individual federal employees. *See, e.g.*, 5 U.S.C. §§ 7114(a)(2)(A), 7114(a)(2)(B), & 7114(a)(4).

The FSLMRS recognizes that a labor organization, which itself is the "exclusive representative" of a bargaining unit, 5 U.S.C. § 7103(a)(16), will necessarily act through "representatives" of its own, *id.* §§ 7114(a)(4) & (b)(2). *See also id.* §§ 7102(1) & 7131(a) & (d). And, the FSLMRS provides that a labor organization may be "represented" in a variety of settings, including contract negotiations, *id.* § 7114(b)(2), "present[ing] the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities," *id.*, § 7102(1), certain "formal discussion[s]" concerning grievances, personnel policies and conditions of employment, *id.* § 7114(a)(2)(A), and certain investigatory examinations, *id.* § 7114(a)(2)(B).

The "agency" that employs the bargaining unit employees will, of course, also act through its own "representatives." 5 U.S.C. §§ 7114(a)(4) & (b)(2). As is true of labor organization representatives, these "representatives" of the agency will also act on the agency's behalf in a variety of settings, including contract negotiations, *id.* § 7114(b)(2), "formal discussion[s]" concerning grievances, personnel policies and conditions of employment, *id.* § 7114(a)(2)(A), and certain investigatory examinations, *id.* § 7114(a)(2)(B).

Individual employees themselves—although represented in contract negotiations exclusively by the labor organization certified as the bargaining unit's certified representative—have the right to be "represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action." 5 U.S.C. 7114(a)(5)(A). The breadth of the statutory definition of the term "grievance"—as including "any complaint . . . by any employee concerning any matter relating to the employment of the employee," *id.* § 7103(a)(9)(A)—is such that there are many opportunities for employees to be represented by a "representative" other than the unit's "exclusive representative" in

dealing with the agency on employment-related matters. *See id.* § 7114(a)(2)(A) ("any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment.").

There is nothing in the FSLMRS limiting the identity of labor organization, agency, and employee "representatives" in the various, widely disparate contexts referred to in the statute. The only condition placed on who is an "appropriate representative" by the FSLMRS is the specification that "an agency and an exclusive representative" must be "represented at [contract] negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment." 5 U.S.C. § 7114(b)(2). Otherwise, the statute does not structure who an agency, labor organization, or employee "representative" shall be in any of the statutory contexts in which it is contemplated that the parties will act—and interact—through representatives.

Given the lack of a statutory definition for the term "representative" and the wide variety of settings in which the statute expressly provides that labor organizations, agencies, and employees will act through representatives, it can only be that Congress did not employ the term "representative" in any special, restrictive sense, but rather intended that the term is to be understood to mean what it means in ordinary usage. *See FDIC v. Meyer,* 510 U.S. 471, 476 (1994) ("In the absence of such a definition [in the Act], we construe a statutory term in accordance with its ordinary or natural meaning.").

The normal meaning of the term "representative," in the usage the FSLMRS obviously employs, is "one that represents another or others in a special capacity." *Webster's Third New International Dictionary* 1926 (1986). *See, e.g.,* 42 U.S.C. § 3058f(5) ("The term 'representative' includes an employee or volunteer who

represents an entity designated under section 3058g(a)(5)(A) of this title and who is individually designated by the Ombudsman."); 45 U.S.C. § 151, Sixth ("The term 'representative' means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them."). Thus, who is a "representative" of a "bargaining unit," "labor organization," "agency," or "employee," within the meaning of the FSLMRS will be determined by who is authorized to represent—in the sense of act for and on behalf of—the "bargaining unit," "labor organization," "agency" or "employee" in the particular setting identified in the FSLMRS.

For example, in "any formal discussion . . . concerning any grievance or any personnel policy or practices or other general condition of employment," the "representatives of the agency," the "representatives" of "one or more employees in the unit," and the representative of the "exclusive representative" will be the persons authorized to act for those various parties in the "discussion." 5 U.S.C. § 7114(a)(2)(A). And, the "representative of the agency" and representative of the "exclusive representative" in an "examination of an employee in the unit" will, likewise, be whoever is authorized to act for those parties in the "examination." 5 U.S.C. § 7114(a)(2)(B).

The NASA-OIG inspector—who "is an employee of and ultimately reports to the head of NASA," Pet. App. 41a—was certainly authorized to act for NASA in conducting the interview in question.

The interview was to provide NASA with information relevant to determining whether to take administrative action with respect to its own employees and operations and in that way to further the agency's purposes.[3] And, gathering information concerning an agency's operations

[3] As the court below noted, by the time of the examination, "NASA-OIG had determined that no criminal action would be taken against the employee." Pet. App. 3a n.1.

is one of the OIG's central assignments. Under the Inspector General Act it is "the duty and responsibility of each Inspector General, with respect to the establishment within which his Office is established . . . to keep the head of such establishment . . . fully and currently informed . . . concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations administered or financed by such establishment, [and] to recommend corrective action concerning such problems, abuses, and deficiencies." 5 U.S.C. app. 3 § 4(a)(5). In this regard, the Senate Report on the bill that was enacted as the Inspector General Act emphasizes that the inspector general is intended to be "the strong right arm" of "the agency head" in "running and managing the agency effectively and [in] rooting out fraud, abuse and waste at all levels." Sen. Rep. No. 95-1071, 95th Cong., 2d Sess. 9 (1978).

Consistent with this statutory assignment, "NASA-OIG performs an investigatory role for NASA, HQ, and its subcomponents," and "[t]he information obtained during the course of an OIG investigatory examination may be released to, and used by, other subcomponents of NASA to support administrative or disciplinary actions taken against unit employees." Pet. App. 42a.

As the court below noted, "[i]n conducting investigations within the agency, NASA-OIG serves the interest of NASA-HQ by soliciting information of possible misconduct committed by NASA employees." Pet. App. 19a. Precisely because that is so, it is NASA that provides the compulsion on NASA employees to subject themselves to examination by the NASA-OIG investigators by providing that employees who refuse to participate are subject to employment discipline. Indeed, the NASA-OIG investigator in this case expressly threatened the NASA employee with such discipline if there was noncooperation. Pet. App. 19a. And, only the head of NASA and his delegates have the authority to discipline a NASA employee. 5 U.S.C. § 302(b)(1); 42 U.S.C. § 2472(a). In contrast,

the Inspector General Act does *not* grant to OIGs any independent authority to discipline agency employees or to otherwise compel the attendance of persons at OIG examinations. 5 U.S.C. app. 3 § 6(a). *See* NASA Br. 31 n. 18 & 32.

Thus, when the NASA-OIG investigator threatened the NASA employee with discipline, the investigator was not threatening the employee with an action the investigator was empowered to take by virtue of any independent authority of the NASA-OIG. Rather, the investigator was threatening the employee with action that NASA would take—exercising the agency's authority as the employer—to further the conduct of the examination into an aspect of NASA operations being carried out by the NASA-OIG for and on behalf of the Agency.

In other words, the NASA-OIG was not only representing NASA's interests in conducting the examination, the NASA-OIG was invoking NASA's authority as employer in carrying out the examination. *See* Pet. App. 19a. That is of particular significance here since the FLRA holds that, faced with "a valid request for union representation," an employer can meet its obligations under FSLMRS § 7114(a)(2)(B) in any one of three ways: "(1) grant the request, (2) discontinue the interview, or (3) offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview at all." *U.S. Department of Justice, Bureau of Prisons*, 27 FLRA 874, 879 (1987). *See NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 258 (1975) ("the employer is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and forgoing any benefits that might be derived from one").

Had the NASA employee here been offered "the choice between continuing the interview unaccompanied by a union representative or having no interview at all," 27 FLRA at 879, rather than being compelled to continue with the interview by the prospect of employment discipline, there would have been *no* FSLMRS § 7114(a)(2)(B) violation. And, it was only the prospect that NASA would discipline a NASA employee for not complying in a NASA-OIG investigator's examination that denies the employees the choice of leaving the examination.

In sum, in conducting the interview at issue, the NASA-OIG investigator was a NASA employee, acting within the scope of his authority as an OIG investigator and under the aegis of NASA's authority as employer and for the purpose of gathering information about NASA operations to be used by NASA in making a decision on whether to take administrative action with respect to a NASA employee and as to the conduct of NASA's operations. All this being true it follows that the NASA-OIG investigator was acting for and on behalf of NASA in conducting the examination and thus as a "representative of the agency" for purposes of FSLMRS § 7114(a)(2)(B).[4]

B. The Legislative Intent.

The FLRA's reading of FSLMRS § 7114(a)(2)(B) is consistent not only with the statutory language but also with the congressional intent behind that language.

"It is apparent from the face of the statute that Congress wanted federal employees to have the assistance of a union representative when they were placed in a position of being called upon to supply information that would expose them to the risk of disciplinary action." *Defense Criminal Investigative Service*, 855 F.2d at 98-99. And, the FSLMRS § 7114(a)(2)(B) legislative materials confirm that "Congress intended that Federal employee have the

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[4] NASA has never questioned that, in conducting the examination in question, the NASA-OIG was acting as a "representative" of an "agency" within the meaning of § 555(b) of the Administrative Procedure Act, which provides that "[a] person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel. . . ." 5 U.S.C. § 555(b). *See* NASA Br. 34.

same rights as their counterparts in the private sector—the assistance of a union representative when they are called upon to provide information that exposes them to the risk of disciplinary action." Pet. App. 41a.

Section 7114(a)(2)(B), as enacted, was part of a comprehensive bill offered by Representative Udall. *See* H. Rep. No. 95-1717, 95th Cong., 2d Sess. 155-156 (1978). Representative Udall explained the purpose of this provision as follows:

> The . . . provisions concerning investigatory interviews reflect the U.S. Supreme Court's holding in *National Labor Relations Board v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) . . . upholding the Board's determination that the National Labor Relations Act provides a statutory "right to union representation at investigatory interviews which the employee reasonably believes may result in disciplinary action against him." 420 U.S. 251 at 267. [124 Cong. Rec. 29,184 (1978).]

Given that purpose, the *Weingarten* case's rationale and the underlying Board law are very much in point. In *Weingarten*, this Court had approved the National Labor Relations Board's "construction [of the National Labor Relations Act] that § 7 creates a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline." 420 U.S. at 256. The Court noted that "th[is] right inheres in § 7's guarantee of the right of employees to act in concert for mutual aid and protection, *id.*, and, in so doing, "insist on concerted protection, rather than individual self-protection, against

[5] NLRA § 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . . [29 U.S.C. § 157.]

possible adverse employer action." *Id.* at 257 (quoting *Mobil Oil Corp.*, 196 NLRB 1052 (1972)).

The *Weingarten* Court explained that the NLRA "protect[s] 'the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of . . . mutual aid or protection'" in order "'to redress the perceived imbalance of economic power between labor and management.'" 420 U.S. at 261-262, quoting 29 U.S.C. § 151 and *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965). And, the Court noted, "[r]equiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate. . . ." *Weingarten*, 420 U.S. at 262. Thus, the Board's construction of the NLRA "gives recognition to the right when it is most useful to both employee and employer." *Id.* at 262.

Elaborating on the utility of union representation in the investigatory setting, the Court explained:

> A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. [420 U.S. at 262-263.]

Indeed, *Weingarten* involved an interview very much like the interview by the NASA-OIG inspector here. For *Weingarten* grew out of a situation in which a sales clerk employed in a store operated by a large retail chain was called in for an interview by a "Loss-Prevention Specialist[]" employed in the chain's "companywide security department" as part of an investigation of alleged thefts. 420 U.S. at 254. And, the NLRB, far from ignoring

this context, specifically relied on the proposition that when "an investigative interview is conducted by security specialists[,] the employee does not confront a supervisor who is known or familiar to him, but a stranger trained in interrogation techniques," and that this unfamiliar setting, along with the "sophisticated techniques" employed by such specialists, "increase not only the employees' feelings of apprehension, but also their need for experienced assistance in dealing with them." *Id.* at 265 n.10.

Given the rationale and particular circumstances of *Weingarten,* it is not surprising that the NLRB has consistently found that employees are entitled to request union representation when they are called into interviews by special employer security officers investigating alleged employee criminal activity. *See, e.g., Illinois Bell Telephone Company,* 221 NLRB 989, 991 (1975) (violation found where the investigation involved alleged theft of company property by the employee, and it was conducted by employer's security representative); *Detroit Edison Company,* 217 NLRB 622, 623 (1975) (violation found where the investigation involved alleged irregularities in travel reimbursement claims by the employer, and it was conducted by the employer's security department).

Against this background, the most sustained argument for "extending to Federal employees the same protection already available to employees in the private sector under the . . . Supreme Court [decision] in *Weingarten*" focuses on the federal sector equivalent of the private sector employer security officer examinations that precipitated the *Weingarten* rule. H. Rep. No. 95-920, 95th Cong., 2d Sess. 2 (1978).

While the FSLMRS was under consideration by the House Committee on Post Office and Civil Service, the Committee also issued a report on H.R. 3793, a bill to "provide Federal employees under investigation for misconduct the right to representation during questioning regarding such misconduct." H. Rep. No. 95-920, 95th

Cong., 2d Sess. 1 (1978).[6] To support its conclusion that there should *not* be "two sets of standards for employee rights, one for the private sector and another, more restrictive standard, for public employees," the Report quotes the following testimony describing investigations at the Internal Revenue Service and the need for assistance to employees subject to such interrogation:

> Typically, when an employee is summoned to appear before an IRS Inspection Service, for example, it is done without warning, and seldom is the employee advised of the nature of the interview. He or she is merely told to report to a certain room at a specified time. Upon arriving, and with no opportunity to collect his or her thoughts, the employee is immediately sworn in and must answer all questions. Failure to report for the interview, be sworn in, or answer any questions is the basis for disciplinary action.
>
> Normally, there are two inspectors present. One conducts the interrogation, firing questions at the employee, while the other takes notes. There is no formal record or transcript of the interview. Though IRS regulations require that inspectors reveal information within their possession concerning the incidents being investigated, this is seldom done.
>
> With no one to advise them of their rights, few employees have the experience or presence of mind to deal with professionally trained criminal investigators who are supposed to be experts in the art of interrogation. Nervous and unaccustomed to such surroundings, employees are oftentimes questioned about matters which occurred years before, may be subject to badgering or harassment, becoming so confused and flustered that they agree with answers sug-

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[6] Insofar as H.R. 3793 would have provided federal employees representation rights similar to those of private section employees, that bill was subsumed in the bill enacted as the FSLMRS.

> gested by the inspectors even though their responses do not truly reflect what transpired. [H. Rep. No. 95-920, p. 3.]

As H. Rep. No. 95-290 shows, Congress in "extend-[ing] *Weingarten* protection to federal employees," Pet. App. 10a, had very much in mind the federal sector equivalent of the type of examination conducted by the employer "security specialists" identified in *Weingarten* itself. 420 U.S. at 265 n.10.

That being so, the FLRA decision in this case—and the Authority's reading of "representative of the agency" on which the decision rests—is correct not only in its general terms but also in capturing Congress' intent with regard to the precise kind of examination by the precise kind of examiner at issue here.

Indeed, the post-FSLMRS-enactment development of the *Weingarten* doctrine itself by the NLRB provides the most striking confirmation of the correctness of the FLRA construction of § 7114(a)(2)(B) and of the Authority's grasp of the underlying congressional intent—*viz.*, to provide federal employees covered by the Federal Labor Statute full *Weingarten* rights.

The NLRB has consistently held that employees of the U.S. Postal Service—which is covered by the NLRA, rather than the FSLMRS, 39 U.S.C. § 1209(a)—have *Weingarten* rights during interviews conducted as part of "criminal investigations conducted by the Postal Inspection Service." *U.S. Postal Service*, 241 NLRB 141, 142 (1979). "Postal inspectors"—like OIG investigators—"are not under the supervision or direction of postal supervisors or managers." *U.S. Postal Service*, 288 NLRB 864, 865 (1988). Rather, the postal inspectors are under "the authority of the Chief Postal Inspector, whose office is in Washington and who reports to the Postmaster General." *Id.*

As the D.C. Circuit noted in sustaining the NLRB's application of *Weingarten* to Postal Inspection Service investigations,

> Postal Inspectors are USPS employees. They serve, however, as federal law enforcement officers, with authority to carry weapons, make arrests, and enforce postal and other laws of the United States. *See* 18 U.S.C. § 3601. The Inspection Service undertakes investigations only when criminal conduct is suspected. If an investigation reveals no crime, the Inspectors turn over the evidence they have gathered to USPS management, without recommendation or evaluation. Management then decides whether the evidence warrants disciplinary action. [*U.S. Postal Service v. NLRB*, 969 F.2d 1064, 1066 (D.C. Cir. 1992).]

Given the all but identical place of the Postal Inspectors in the Postal Service structure and of the NASA-OIG investigators in the NASA structure and given the all but identical employee examinations for all but identical establishment purposes each conducts, it follows *a fortiori* from the *Postal Service* cases, we submit, that the FLRA is correct in its recognition that a NASA employee who is subject to a NASA-OIG examination like the one here has the cognate *Weingarten* right it is the purpose of FSLMRS § 7114(a)(2)(B) to provide.

C. NASA's Reading of the Phrase "Representative of the Agency" Is Contrary to the Statutory Language and Would Defeat the Legislative Intent.

NASA's basic position is that "the phrase 'representative of the agency'" in FSLMRS § 7114(a)(2)(B) "describe[s] a representative of . . . the entity that has a collective bargaining relationship with a union," NASA Br. 8, and that "an OIG investigator is not such a representative and therefore is not required to comply with 5 U.S.C. § 7114(a)(2)(B) when conducting investigative interviews," *id.* at 16. NASA can thus be understood (i) to be contending that the "pertinent 'agency,'" *Department of Justice*, 137 F.3d at 688, is some entity *other* than NASA, which other entity the NASA-OIG does not represent; or (ii) to be contending that the NASA-OIG is not a NASA "representative." In either version, NASA's

argument is contrary to the statutory language and to the effectuation of the representation rights so evidentially granted to federal employees by that language.

1. We begin by taking NASA to be seeking—as have other federal agencies in resisting union representation at OIG interrogations—"an interpretation of the statute limiting 'agency' to the subdivision comprising the collective bargaining unit." *Defense Criminal Investigative Service*, 855 F.2d at 99. In this vein, NASA's brief distinguishes between a "parent agency" and the "component of the agency . . . that directly employs the person under investigation." NASA Br. 22 & 23. *See also* NASA Cert. Pet. 12 ("agency component that engages in collective bargaining"). And, based on this distinction, NASA asserts that the "agency" referred to in § 7114(a)(2) is "the management entity that has a collective bargaining relationship with a union," NASA Br. 8, rather than the "parent agency," *id.* at 22. *See also id.* at 23 ("The OIG does not in fact contain the bargaining unit to which the employee under investigation belongs. . . .").

In its brief to this Court, NASA maintains a studied vagueness about what it means by the "component of the agency," NASA Br. 23, that is "the management entity that has a collective bargaining relationship with a union," *id.* at 18.[7] But, whatever NASA's precise meaning may be, the proposition that a "management entity" that is a "component of the agency" can itself be an "agency" within the meaning of the FSLMRS will not wash.

Simply stated, the FSLMRS does *not* provide for any "collective bargaining relationship between a union and *management*," much less between a union and a "management entity." NASA Br. 17 & 18 (emphasis added). The statute provides for collective bargaining—and other forms of representation and consultation—between an

[7] A clue to NASA's meaning is supplied by its answer in this case, which identifies the Marshall Space Flight Center as a "component installation of NASA under 14 C.F.R. § 1201.200(c)(7)." Answer ¶ 5.

"*agency* and an[] exclusive representative in an[] appropriate unit." 5 U.S.C. § 7114(a)(4) (emphasis added). *See* 5 U.S.C. § 7114(c)(1) (any agreement reached in negotiations is "subject to approval by the head of the agency"). And, as we have demonstrated at pp. 9-10, and as we reiterate in the margin, the statutory definitions exclude the possibility that a "management entity," NASA Br. 18, that is a "component of the agency," *id.* at 23, can itself be considered an "agency" within the meaning of the FSLMRS.[8] Indeed, at one point NASA recognized as much—its answer "denie[d] that the George C. Marshall Space Flight Center (MSFC) is an agency under 5 U.S.C. § 7103(a)(3)," precisely on the grounds that "MSFC is a component installation of NASA." NASA Answer § 5.

2. Alternatively, NASA can be understood to take the position that, even though NASA is the pertinent "agency," the NASA-OIG investigator cannot be NASA's "representative" for purposes of FSLMRS § 7114(a)(2)(B). In its first variant, NASA's point is that the term "representative" of an agency, as used in the FSLMRS, refers exclusively to the agency's collective bargaining representative, and that the NASA-OIG investigator, not being a collective bargaining representative, cannot be a "repre-

[8] By the Federal Labor Statute's definition, *only* an "Executive agency" qualifies as an "agency." 5 U.S.C. § 7103(a)(3). As we have seen, NASA is an "Executive agency" by virtue of the fact that the Administration is an "independent establishment" in the executive branch. 5 U.S.C. §§ 104 & 105. *See* pp. 9-10, *supra*. And, as we have stressed, the definition of "independent establishment," *expressly excludes* "an establishment in the executive branch" that is a "*part of* an independent establishment." 5 U.S.C. § 104(1) (emphasis added). Thus, if NASA is an "independent establishment"—and NASA unquestionably is—then NASA's Marshall Space Flight Center is a "part of an independent establishment" and, by virtue of that fact, *cannot* be an "independent establishment" itself. 5 U.S.C. § 104(1). If the Center is not "an independent establishment," the Center—as an "entity" distinct from NASA—cannot be an "Executive agency," 5 U.S.C. § 105, and, thus, cannot be an "agency," as defined in the FSLMRS § 7103(a)(3).

sentative" in any other sense. In its second variant, NASA's point is that a "representative" is a person in the line of management control of the party the "representative" represents and that to the extent a NASA-OIG investigator is independent of NASA's managers, he cannot be a "representative of th[at] agency." We take these variations on a theme in turn.

a. In the first regard, NASA begins from the proposition that "[a]ll of the rights and duties in Section 7114 arise out of the collective bargaining relationship between a union and management," NASA Br. 17, and claims that " 'representative of the agency' in Section 7114(a)(2)(B) must also refer to a representative of management in the collective bargaining relationship," *id.* at 19, in the sense of the person or division of the agency that "represents management" at "the bargaining table," *id.* at 22.

(i) NASA's premise is wrong, and its conclusion is therefore wrong as well. Section 7114 refers to representation in *at least three different settings*—"negotiat[ion of] collective bargaining agreements," § 7114(a)(1), "formal discussion[s] . . . concerning any grievance or any personnel policy or practices or other general condition of employment," § 7114(a)(2)(A), and the "examination of an employee in the unit by a representative of the agency," § 7114(a)(2)(B)—and *not* in the single setting of collective bargaining negotiations. And, there is nothing in the FSLMRS that suggests, much less compels, the conclusion that the statute contemplates an "agency" will be and must be represented by the same person or division in each of these different settings. Nor is there anything in reason, in the general statutes governing the organization and management of independent executive branch establishments or in normal organizational practice that dictates such an arrangement.

As the Third Circuit noted, "an Executive agency, like many large corporations, might choose an organizational structure including a personnel relations department whose

specialized employees are charged with the responsibility of negotiating collective bargaining agreements on behalf of all subdivisions of the agency." *Defense Criminal Investigative Service*, 855 F.2d at 99.

(ii) In a nod toward the statutory definitions, NASA finds it significant that the statute defines "collective bargaining" as "the mutual obligation of *the representative of an agency* and the exclusive representative of employees in an appropriate unit . . . to consult and bargain in a good faith effort to reach agreement." NASA Br. 18, quoting with emphasis 5 U.S.C. § 7103(a)(12). According to NASA, because the emphasized phrase "representative of an agency" in § 7103(a)(12) is similar to the phrase "representative of the agency" in § 7114(a)(2)(B), the most appropriate inference is that Congress intended, in both instances, that the "representative" of the agency must be the same person or subpart of the agency. *See id.* at 18 & n.8.[9] With all due respect, that is a completely improbable inference.

The use of the term "representative" throughout the FSLMRS is most fairly interpreted as showing Congress's recognition that agencies and labor organizations, as legal entities, can only participate in "negotiations," 5 U.S.C. § 7114(b)(2), "formal discussion[s]," *id.* § 7114(a)(2)(A), or "examination[s] of an employee," *id.* § 7114(a)(2)(B), through persons who act for and on their behalf—*viz.*, through "representative[s]." The fact that the statute uses the term "representative"—in its ordinary sense as referring to someone who represents another—in these various contexts does not provide any basis for the

[9] In a similar vein, NASA finds it significant that OIG employees are excluded from any appropriate bargaining unit by FSLMRS § 7112 (b). NASA Br. 23 & 32 citing 5 U.S.C. § 7112(b)(7). But § 7112(b) also excludes "any management official or superior" from any appropriate bargaining unit. 5 U.S.C. § 7112(b)(1). And, we do not understand NASA to argue that no "management official or supervisor" can be a "representative of the agency" within § 7114(a)(2)(B).

proposition that each party is put into a straight jacket by being allotted one representative who must remain the same in all contexts no matter how different those contexts may be.

It is particuarly to the point that there is nothing in the language, purpose or explanation of FSLMRS § 7114(a)(2)(B) to suggest that an employee has the right to union representation only when the "representative[s] of the agency" at examination happen to be the agency's collective bargaining representative as well. Indeed, there is nothing in the statute to suggest that collective bargaining should even take place during the examination, and the well-settled restrictions on the role of the union representative in the examination strongly suggest the contrary.[10]

Nor is there any reason to believe that Congress thought the need for union representation was greater when the examiner is the agency's collective bargainer than when the examiner is its trained investigator. To the contrary, as we have seen, all indications are that Congress was concerned especially about the employee's need for assistance when the examiner is a security specialist.

And, it is surely not coincidental that NASA's reading of § 7114(a)(2)(B) would permit an agency to eliminate entirely the *Weingarten* rights of employees in a bargaining unit constituted on less than an agency-wide basis by simply assigning the agency's collective bargaining to

[10] It is equally clear that the "formal discussion[s] between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment" referred to in § 7114(a)(2)(A) do *not* constitute collective bargaining. *See* NASA Br. 19. The employees are represented in collective bargaining *only* by their "exclusive representative." 5 U.S.C. § 7114(a)(4). That is what the "exclusive" in "exclusive representative" means. The opportunity for employees to address employment-related matters through a "representative, other than the exclusive representative, of the employee's own choosing" is restricted to a "grievance or appeal action." *Id.* § 7114(a)(5)(A).

local management while keeping the authority to investigate employee misconduct in a centralized security office.[11]

(iii) NASA's attempt to demonstrate that the "representative" referred to in § 7114(a)(2)(B) must be a coltive bargaining representative because this Court's *Weingarten* decision treats the right to union representation at investigatory interviews as a species of the right to engage in collective bargaining, NASA Br. 19-21, is every bit as wrong as its statutory language argument.

Weingarten rights under both the NLRA and the FSLMRS are *not* a species of collective bargaining rights in the narrow sense that NASA would understand that term. This Court's opinion in *Weingarten* repeatedly emphasizes that "the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview." 420 U.S. at 259. *See also id.* at 260 ("The employer has no duty to bargain with the union representative" and may "insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation."). And, the violation found by the NLRB in *Weingarten*—as is true of the violation found by the FLRA here—was *not* the unfair labor practice of "refus[ing] to bargain collectively with the representatives of [the] employees," 29 U.S.C. § 158(a)(5), 420 U.S. at 264, but the § 8(a)(1) violation of "interfer[ing] with, restrain[ing], and coerc[ing] the individual right of the employee, protected by § 7 of the Act, 'to engage in . . . concerted activit[y] for . . . mutual aid or protection,'" *id.* at 252. *Compare* Pet. App. 49a ("find[ing] . . . that NASA . . . committed unfair labor practices in violation of section 7116(a)(1) and (8) of the Statute") *with* 5 U.S.C. § 7116(a)(5) ("it shall be an unfair labor practice for an agency . . .

[11] The FSLMRS provides for "appropriate unit[s] . . . established on an agency, plant, installation, functional, or other basis." 5 U.S.C. § 7112(a).

to refuse to consult or negotiate in good faith with a labor organization as required by this chapter").[12]

In addition, the *Weingarten* Court's recognition that "seeking the assistance of his statutory representative" at an investigatory interview is the exercise of an "*individual* right," 420 U.S. at 257 (emphasis added), demonstrates that *Weingarten* right is different in nature from the right to engage in *collective* bargaining. *See also id.* at 256 ("serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative"). Given the "individual" nature of this right, for example, the employee may individually waive representation by agreeing "to enter the interview unaccompanied by his representative." *Id.* at 258-259. *See also id.* at 257 ("In other words, the employee may forgo his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative."). The right to collectively bargain, as a statutory collective right, by contrast, may not be waived by individual employees without the agreement of the bargaining unit's exclusive representative. *See Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684 (1944) ("Bargaining carried on by the employer directly with the employees . . . would be subversive of the mode of collective bargaining which the statute has ordained . . . .").

b. NASA argues too that NASA-OIG cannot be viewed as NASA's representative, because the agency "could not direct the investigator, and * * * ha[s] no control over him." NASA Br. 23. This variant of NASA's position is flawed in both its major and minor premises.

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12 At one time, the NLRB did find a "collective bargaining" right to union representation during certain interviews. *Texaco, Inc., Houston Producing Div.*, 168 NLRB 361, 362 (1967), *enf. den'd*, 408 F.2d 142 (5th Cir. 1969). But the Board distinguished that right from the right to representation sustained in *Weingarten*. *Quality Manufacturing Co.*, 195 NLRB 197, 198 (1972), *aff'd, sub nom. Garment Workers v. Quality Manufacturing Co.*, 420 U.S. 276 (1975).

To begin with the argument's minor premise, it is simply not true that NASA has "no control" over a NASA-OIG investigator. As a general matter, the NASA-OIG is a "unit[]" within NASA, 5 U.S.C. app. 3 § 2, "under the general supervision of the head of [NASA]," *id.* § 3(a). And, as part of his or her "general supervision" of NASA-OIG, the head of NASA surely has authority to direct OIG investigators to conduct their investigations in conformity with federal law.

Indeed, as we have stressed an employer can meet its obligations under § 7114(a)(2)(B) by simply "offer[ing] the employee the choice between continuing the interview unaccompanied by a union representative or having no interview at all." *U.S. Department of Justice, Bureau of Prisons*, 27 FLRA at 879. And, it was only the prospect of employment discipline by NASA if an employee does not respond to the call of a NASA-OIG investigator to an interview that denied the employee here the "choice . . . [of] having no interview at all." Thus, had NASA itself taken steps to assure the employee that he was free to decline to participate in the examination without any prospect that NASA would discipline the employee for so declining, then there would have been no violation at all.

The major premise of NASA's argument—that the *sine qua non* of a "representative" is being under the direction and control of the represented party's general managers—is made of whole cloth. So far as NASA shows, and so far as we are aware, there is no iron law of establishments that decrees that all employees acting for and on behalf of an establishment must be under the control of the establishment's general management. Indeed, as the *Weingarten* cases cited at pp. 19-23, *supra*, demonstrate, it is not unusual for private sector establishments, like retail store chains, and public sector establishments, like the Postal Service, to provide for an internal security division with certain investigative responsibilities that *operates within its scope of general authority and outside of the line of control of the establishment's general management.*

Under the general definition of "representative," at least so long as those investigators are carrying out an authorized investigation on behalf of the establishment, the investigators are every bit as much the establishment's representatives as if the investigators were under the control of general management. In both situations, the investigator is acting within the scope of his authority for and on behalf of the establishment.

* * *

In sum, the FLRA's construction of the statutory phrase "representative of the agency" in FSLMRS § 7114(a)(2)(B) is not only consistent with the plain meaning of the statutory language but well-suited to fulfilling the Congressional purpose in enacting that provision. The alternative interpretation of that statute advanced by NASA, in an attempt to impeach the FLRA's construction of the FSLMRS, serves only to underscore the reasonableness of the Authority's interpretation. The Authority's interpretation is, therefore, surely a "permissible construction of the statute," *Fort Stewart Schools*, 495 U.S. at 645, and was properly sustained as such by the court below, Pet. App. 9a.

II. FSLMRS § 7114(a)(2)(B), AS CONSTRUED BY THE FLRA, DOES NOT CONFLICT WITH THE INSPECTOR GENERAL ACT.

Given that the FLRA's construction of the statute the Authority is charged with enforcing is sound, the remaining question is, as the court below put it, whether there is such "a discernible present conflict between the I[nspector] G[eneral] Act and [FSLMRS] § 7114(a)(2)(B)" as to require "read[ing] the IG Act to have impliedly repealed this section of the FSLMRS." Pet. App. 15a. And, as the court below concluded, in agreement with the Third Circuit, FSLMRS § 7114(a)(2)(B) and the Inspector General Act are not "so clearly irreconcilable" as "to imply an exception [to the former] based solely on the enactment of the IG Act." *Defense Criminal Investigative Service*, 855 F.2d at 100. Pet. App. 14a-15a.[13]

NASA posits two points of conflict between the FSLMRS and the IGA. First, NASA argues that allowing a union representative to be present at an employee examination will interfere with "the OIG's duty to maintain confidentiality." NASA Br. 33. Second, NASA argues the FLRA's construction of FSLMRS § 7114(a)(2)(B) "imposes major restrictions on the OIG's freedom to investigate." *Id.* at 34. We take up each point in turn.

A. NASA maintains that the "[a]ttendance of a union representative at an OIG interview can interfere with the reporting and nondisclosure obligations imposed by the Inspector General Act." NASA Br. 33. The statutory provision, which, according to NASA, imposes these "ob-

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[13] We note parenthetically that the greater part of NASA's argument from the Inspector General Act does *not* concern any alleged conflict between the IGA and the FSLMRS but rather the assertion that the independence granted to the Office of the Inspector General under the IGA precludes treating an OIG investigator as a "representative of the agency" within the meaning of FSLMRS § 7114(a)(2)(B). We have addressed that argument in point I, *supra*, and demonstrated that the FLRA was acting well within its discretion in rejecting NASA's argument as to the proper construction of FSLMRS § 7114(a)(2)(B).

NASA incorrectly suggests, in this regard, that the FLRA's application of FSLMRS to OIG investigations is "not entitled to deference" on the grounds that the "FLRA's ruling in this case depends on a construction not of the FSLMRS, but also of the Inspector General Act." NASA Br. 39. Aside from the two asserted conflicts between the FSLMRS and the IGA, which we discuss in text in this part of our brief, neither the FLRA, nor the union party to this case, has joined issue with NASA over the meaning of the various provisions of the IGA discussed at pages 25-33 of NASA's brief. Thus, the FLRA's consideration of that argument does not depend on any "construction . . . of the Inspector General Act," NASA Br. 39, but only on a construction of FSLMRS against the backdrop provided by the plain—and uncontested—meaning of the IGA.

ligations" on an OIG is IGA § 4(d) which in its entirety, states:

> In carrying out the duties and responsibilities established under this Act, each Inspector General shall report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law. [5 U.S.C. app. 3 § 4(d).]

There is nothing in this provision that even suggests an OIG "nondisclosure obligation[]," NASA Br. 33, or a "duty of confidentiality." *Id.* at 34.

That is sufficient in itself to defeat NASA's conflict claim. And, even giving NASA its premise, its argument proves attenuated in the extreme.

NASA argues that the union representative might breach confidentiality "by sharing information learned during the investigatory interview with other members of the collective bargaining unit, who might subsequently be interviewed or requested to produce documents." NASA Br. 34. But assuming there was an OIG investigator's "duty of confidentiality" with respect to the subject matter of an OIG investigation, *id.*, the interview itself is most assuredly *not* confidential.

In the first place, there is nothing to stop the interviewed employee from sharing with other employees or with the union what went on in the interview. Moreover, as NASA admits, the employee has a right to be accompanied in the examination by a personal attorney under 5 U.S.C. § 555(b), and while NASA speculates that "[a]n employee's attorney *may* have incentives not to share information with other employees," NASA Br. 34 (emphasis added), there is certainly nothing in the law that precludes the attorney from so doing.[14]

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[14] The "incentives" against sharing information that NASA believes an attorney "may have" are "preserv[ing] the attorney-client privilege and avoid[ing] the appearance of witness tampering or obstructing a federal inquiry." NASA Br. 34. But statements made by the employee to an OIG investigator are not privileged. And, the union representative "may have" the same "incentives" to avoid the "appearance of witness tampering or obstructing a federal inquiry." *Id.*

In any event, the NASA-OIG raised no concern about "confidentiality" when he allowed both a union representative and the employee's attorney to be present at the examination in question. If serious concerns about confidentiality arise in future OIG examinations, those concerns can be addressed at the time. The FLRA recognizes that "agency management may have need, under certain circumstances, to place reasonable restrictions on the exclusive representative's participation at a section 7114(a)(2)(B)." Pet. App. 46a. In appropriate circumstances, it may be appropriate for an agency to insist on a confidentiality agreement from the union. *See Oil, Chemical & Atomic Workers v. NLRB*, 711 F.2d 348, 362 (D.C. Cir. 1983).

B. NASA also argues that FSLMRS § 7114(a)(2)(B) "imposes major restrictions on the OIG's freedom to investigate," because that "provision as construed by the FLRA involves far more than the mere presence of a union representative at an interview." NASA Br. 34. NASA acknowledges, in this regard, that it can "'point[] to no specific examples in which the assertion of *Weingarten* rights has interfered with OIG investigations.'" NASA Br. 35, quoting Pet. App. 14a. But, NASA maintains, nevertheless, that there has been "insufficient weight [given] to the concerns expressed by OIGs over the broad expansion of statutory *Weingarten* rights in the FLRA's decisions." NASA Br. 35-36.

Whether the FLRA is guilty of some overly "broad expansion of statutory *Weingarten* rights with regard to the role of a union representative at an OIG examination," NASA Br. 35-36, is, of course, *not* a question before the Court in this case. That was an issue before the FLRA,

because NASA initially defended itself on the grounds that "it had acted reasonably" in limiting the intervention of the union representative and that it had "not interfered with [the representative's] rights to participate." NASA Br. 9. In the court below and in this Court, however, NASA has taken the more aggressive position that there is *no* right to union representation at all. Thus, the only FLRA ruling here is the narrowest possible ruling—*viz.* that federal employees have a *Weingarten* right in an OIG examination of the kind at issue here.

In any event, when NASA makes concrete its "concerns," those prove entirely insubstantial. NASA points to precisely two FLRA rules that ostensibly allow a union representative to "direct and limit how the Inspector General conducts an investigation." NASA Br. 35. The FLRA rules in question are: that the union representative has a right to "be informed in advance of the general subject of an examination so that the employee and union representative may consult before questioning begins;" and that the employee has "the right to halt the examination and to step outside the hearing of investigators to discuss with the union representative answers to the investigator's questions." *Id.* at 35. But see *Bureau of Prisons*, 52 FLRA 421, 432-435 (1996) (holding that there is no per se right to halt an examination.)

Neither of these consultation rights even remotely allows the union representative to "direct and limit how the Inspector General conducts an investigation." *Id.* at 34. And, it is difficult to believe that the employee's attorney —whose presence as of right is uncontested by NASA— would not have similar rights to consult with his or her client. 5 U.S.C. § 555(b).

It bears emphasis, in this regard, that the IGA gives OIG investigators *no* authority to compel employee attendance at interviews. The *only* means an OIG investigator has of compelling a federal employee to participate in an interview is by drawing upon the authority of the

agency to discipline the agency's employee for refusal to participate. IGA "authorize[s]" OIGs to "request such . . . assistance" from a federal agency. 5 U.S.C. app. 3 § 6(a)(3). But the IGA does only requires the agency to comply with the request "insofar as is practicable and not in contravention of any existing statutory restriction or regulation." *Id.* § 6(b)(1).

Thus, the IGA is not violated when a federal agency meets its duty under FSLMRS § 7114(a)(2)(B) by insuring that its employees are given the choice of declining to participate in an interview the employee reasonably believes may result in discipline where the OIG investigator refuses the employee's request for union representation. The agency can accomplish this, by merely making clear to its employees that it will not discipline them for declining to participate in such an interview.

CONCLUSION

For the above stated reasons the decision below should be affirmed.

Respectfully submitted,

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(6)

No. 98-369

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, WASHINGTON, D.C., AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, OFFICE OF THE INSPECTOR GENERAL,
Petitioners,
v.
FEDERAL LABOR RELATIONS AUTHORITY AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR AMICUS CURIAE NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT OF RESPONDENTS

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BRIEF FOR AMICUS CURIAE NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE [1]

Amicus curiae, the National Treasury Employees Union (NTEU), is a federal sector labor organization that is the

[1] The parties have consented to the filing of this brief and their letters of consent have been lodged with the Clerk of this Court. Counsel for no party has written any part of this brief, and no person or entity other than the *amicus* has made a monetary contribution to the preparation or submission of the brief.

exclusive bargaining representative of approximately 140,000 federal employees nationwide. Among those represented by NTEU are approximately 113,000 employees of the United States Department of the Treasury, 93,000 of whom work for the Internal Revenue Service, a subcomponent of that department. *See, e.g., Department of Treas., IRS v. Federal Lab. Rel. Auth.*, 494 U.S. 922 (1990).

NTEU and the employees it represents have a substantial interest in the resolution of the question here, regarding whether an Office of the Inspector General (OIG) investigator is a "representative of the agency" within the meaning of 5 U.S.C. 7114(a)(2)(B) of the Federal Service Labor-Management Relations Statute (FSLMRS), 5 U.S.C. 7101-7135. That provision extends to those employees covered by the FSLMRS the rights established for private sector employees in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

IRS bargaining unit employees within the Treasury Department have a particularly vital stake in resolution of this case. Since 1951, these employees have been subject to interrogation by investigators with IRS' Office of Chief Inspector (the Inspection Service or Inspection); that office was charged with, among other things, carrying out investigations of possible employee fraud, bribery and other serious employee misconduct. As explained below, it was well established that IRS employees undergoing interrogation in those Inspection investigations were entitled to union representation under 5 U.S.C. 7114(a)(2)(B).

As a result of the recently enacted Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, 112 Stat. 685 (1998) (the IRS Reform Act), virtually all of the functions of the Inspection Service are transferred to a newly created Treasury Inspector General for Tax Administration (TIGTA), effective January 18,

1999.[2] IRS Reform Act § 1103(c). The investigations formerly conducted by Inspection will now be conducted for Treasury under the auspices of the newly constituted TIGTA by the same personnel who had been housed in Inspection.

Congress gave no hint, in passing the IRS Reform Act, that employee representation rights would be changed by the transfer of investigatory functions from Inspection to TIGTA. A ruling by this Court, however, that Inspector General investigators are, by definition, not "representatives of the agency" within the meaning of the FSLMRS would apparently terminate the long-held right of Treasury's IRS bargaining unit employees to representation in interviews that they reasonably believe could result in disciplinary action. Accordingly, NTEU files this brief in support of the respondents.

BACKGROUND

1. The bargaining unit at IRS, within the Department of Treasury, contains a range of employees, including revenue agents, revenue officers, tax examiners, customer service representatives, computer specialists, as well as secretaries and other lower graded employees. Allegations of serious misconduct by these employees have historically been investigated by individuals employed by the IRS Inspection Service.

The Inspection Service was established on October 1, 1951, in the wake of the discovery of serious corruption at the IRS. H.R. Conf. Rep. No. 105-599 (1998), *reprinted in* U.S.C.A. Spec. Ed., Internal Revenue Service Restructuring and Reform Act of 1998, at 77 (West

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[2] The provisions of the IRS Reform Act relating to the TIGTA are found primarily in Section 1103, which amends the Inspector General Act of 1978 (5 U.S.C. app. 3), and, to a limited degree, in Section 1102, which amends Section 7803 of the Internal Revenue Code of 1986 (26 U.S.C. 7803).

1998) (Conf. Rep.).[3] The mission of Inspection has been to "promote public confidence" in the IRS by providing "independent and professional" audits and investigations that, among other things, "[d]etect and deter fraud and abuse in IRS programs and operations." IRS, *A Guide to the IRS* 71 (1998) (Information about the Internal Revenue Service for Congressional Staff) (*Guide*). The Chief Inspector reported directly to the Commissioner and Deputy Commissioner of the IRS. As President Truman declared when the Inspection Service was founded, Inspection would be "completely independent of the rest of the [IRS]." Conf. Rep. at 77. The Inspection Service was not the component of the agency responsible for engaging in collective bargaining with NTEU.

One of Inspection's principal functions was to carry out employee conduct investigations involving allegations of illegal activities or any other improper acts of employees. Inspection's responsibilities thus included law enforcement duties—specifically, criminal investigations of employee conduct, such as fraud, bribery and assaults. *Id.* at 78. In connection with those duties, Inspection's investigators were authorized to execute and serve search and arrest warrants, serve subpoenas and summonses, make arrests without warrants, carry firearms, and seize property subject to forfeiture. *Id.* at 78-79.

Inspection had also been responsible for administrative investigations of other serious employee misconduct, such as ethical violations. IRS, *Internal Revenue Manual* 751.2(2), 751.31(2) (current version) (IRM). Results of Inspection's investigations were "reported to IRS managers, who determine if the employee is suitable for retention in the IRS or if other disciplinary action is necessary." *Guide* at 72; *see also* IRM at 751.31(3), 751.33, 10.132.

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[3] Citations to "Conf. Rep." will refer to the page numbers of the version reprinted in the U.S.C.A. Special Edition.

2. The mission and responsibilities of the Inspection Service—to promote the agency's effective and efficient administration and to detect and deter fraud and abuse—thus mirrored those of Inspectors General. *See, e.g.*, 5 U.S.C. app. 3, § 2. Indeed, since the creation of the Treasury Office of Inspector General (Treasury IG) in 1988, all audits and investigations of the IRS Inspection Service were subject to the oversight of the Treasury IG.[4] *Id.* at § 8D. Hence, the Inspector General Act mandated that Inspection "shall promptly report" to the Treasury IG all "significant activities being carried out" by that office. *Id.* at § 8D(a)(3)(b). In addition, the IRS Commissioner was required to consult with the Treasury IG before selecting someone for the position of Chief Inspector and all other senior executive positions within the Inspection Service. Conf. Rep. at 77.

3. On July 22, 1998, the President signed the IRS Reform Act into law. The Act was the culmination of an extensive congressional inquiry into the operations of the IRS; much of that inquiry focused on dissatisfaction with the Inspection Service.

a. Among the principal reforms made by the IRS Reform Act were the creation of an IRS oversight board and, by amendment of the Inspector General Act of 1978, the establishment of a second Department of Treasury IG, to be known as the Treasury Inspector General for Tax Administration (TIGTA). IRS Reform Act §§ 1101, 1103(a). The Act eliminated the IRS' Inspection Service; virtually all of its powers and responsibilities (in-

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[4] Pursuant to Memoranda of Understanding between the Commissioner of IRS and the Treasury IG, the latter was responsible for investigating alleged misconduct on the part of IRS employees at grade 15 and above; employees of the Office of Chief Counsel; and employees of the Office of the Chief Inspector. Conf. Rep. at 75. In addition, other allegations involving "significant or notorious" matters were to be referred to the Treasury IG, and investigations arising out of such referrals "generally" would be conducted by the Treasury IG. *Id.*

cluding the bulk of its investigatory personnel) have been transferred to the TIGTA. Conf. Rep. at 79, 83; IRS Reform Act § 1103(c). The TIGTA "is under the supervision of the Secretary of Treasury" (Conf. Rep. at 80), and also must make reports to the IRS oversight board and to Congress. IRS Reform Act § 1103(b)(6).

Thus, the TIGTA joins the previously existing Treasury IG. Under the new IRS Reform Act scheme, the Treasury IG will continue to perform its current duties—generally, the conduct of internal audits and investigations "relating to the programs and operations of the Treasury" —with the exception of those relating to the IRS. Conf. Rep. at 74; *see* IRS Reform Act § 1103(b) (amending 5 U.S.C. app. 3, §§ 8D(a)-(b)). The TIGTA "shall exercise all duties and responsibilities" of an IG "on all matters relating to the [IRS]." IRS Reform Act § 1103 (b)(7).

As a result of the transfer of Inspection functions effected by the Reform Act, the TIGTA is now charged with "conducting audits, investigations, and evaluations of IRS programs and operations . . . to promote the economic, efficient and effective administration of the nation's tax laws and to detect and deter fraud and abuse in IRS programs and operations." Conf. Rep. at 80. The TIGTA further absorbs Inspection's function of investigating alleged employee criminal conduct "as well as administrative misconduct . . . ." Conf. Rep. at 81; *see* IRS Reform Act §§ 1103(b)(7), (c).

The IRS will be requiring employees, under pain of discipline, to appear at TIGTA interviews and to answer questions. *See* Rule 214.1, Interim IRS Rules of Conduct (1994) (requiring employees to respond to questions concerning matters of official interest when directed to do so by a "competent authority"); 31 C.F.R. 0.735.48 (same). And, as was the case with Inspection, TIGTA will be reporting the results of its investigations to the IRS for any appropriate administrative action. Conf. Rep. 79-80.

b. The Senate Report, S. Rep. No. 105-174 (1998), which was largely adopted by the conferees, and the hearings held in connection with the IRS Reform Act shed light on the reasons for the transfer of functions from Inspection to the TIGTA. Briefly, the Congress believed that Inspection lacked sufficient autonomy from the IRS and that a more independent entity was needed to evaluate and improve IRS programs. *Id.* at 29. Testimony during the Senate hearings revealed an overriding concern with misconduct by agency management officials that had gone unchecked by Inspection. *IRS Oversight, Hearings on H.R. 2676 Before the Senate Comm. on Finance,* 105th Cong. 19, 199, 276 (S. Hrg. 105-598) (1998) (*Oversight Hearing*). Cited examples of misconduct included setting tax collection quotas (*id.* at 150, 159, 179); retaliation against whistleblowers (*id.* at 19, 41-42, 156); uneven enforcement of the tax laws, condoned or encouraged by management (*id.* at 130-135, 139-142, 146, 162-63); favoritism (*id.* at 153); and insufficient management response to taxpayer abuse or coverups (*id.* at 55, 60, 170-75).

IRS' response to these management abuses was faulted. There was testimony that management officials were disciplined less severely than rank and file employees (*Oversight Hearing,* at 17, 19-21, 273), and that Inspection was informing management of employee complaints about agency operations, which led to retaliation against those employees (*id.* at 17, 274). There was also considerable testimony that Inspection was too close to agency officials to investigate vigorously complaints about management. *Id.* at 238, 271; *IRS Restructuring, Hearings on H.R. 2676 Before the Senate Comm. on Finance,* 105th Cong. 433 (S. Hrg. 105-529) (1998) (*Restructuring Hearing*). The hearings further revealed a need to institute a mechanism that would encourage rank and file employees to report waste, fraud, and misconduct and to increase the accountability of managers. *Oversight Hearing,* at 44, 113, 277.

Ultimately, Congress decided that creation of an independent TIGTA was the best way to address these defects in the IRS and in the Inspection Service, in particular. The IRS Reform Act and its history make clear, however, that the TIGTA's autonomy is not absolute. Besides placing the TIGTA under the general supervision of the Secretary of the Treasury, the IRS Reform Act specified that the Commissioner of the IRS may request that the TIGTA conduct an investigation relating to the IRS. IRS Reform Act § 1103(b)(7) (amending 5 U.S.C. app. 3, § 8D by adding § (l)(1)). If the TIGTA declines to comply with that request, it is required to "timely provide a written explanation" for that refusal. *Id.* The Joint Explanatory Statement of the Committee of Conference underscored the conferees' clear expectation that the TIGTA "shall make all reasonable efforts to be responsive to the requests of the Commissioner . . . ." Conf. Rep. at 83-84.

SUMMARY OF ARGUMENT

The Solicitor General asks the Court to embrace a *per se* rule that Office of Inspector General investigators never function as "representatives of an agency" within the meaning of section 7114(a)(2)(B) of the FSLMRS. According to the Solicitor General, an OIG cannot be viewed as such because the phrase "representative of the agency" refers only to an "agency component that engages in collective bargaining with the union at issue," which does not include an OIG. (*See* NASA pet. for cert. at 12; *see also* NASA Br. at 18 (referring to "entity" that has a collective bargaining relationship with a union")). The error of this key principle is made particularly manifest when it is examined in the context of the Internal Revenue Service.

1. Among other things, the IRS Reform Act transfers virtually all of the functions and personnel of the IRS Inspection Service to a newly created Inspector General position within the Treasury Department, the TIGTA.

Prior to the IRS Reform Act's implementation, the Inspection Service performed a role akin to that of an IG—namely, to ferret out fraud and abuse in IRS programs and operations. Reporting directly to the Commissioner and independent of the rest of the IRS, Inspection's charge included the carrying out of both criminal and administrative investigations of alleged employee fraud and other serious employee misconduct. The Inspection Service was not, however, the component of the agency responsible for engaging in collective bargaining with NTEU.

It has long been settled under the FSLMRS that Inspection acted as a "representative of the agency" within the meaning of 5 U.S.C. 7114(a)(2)(B) when it conducted employee interviews. The cases, consistent with the FSLMRS and its legislative history, uniformly recognize this principle, and it has never been contested by the federal government. Indeed, the government has not taken issue with Inspection's role as a "representative of the agency" despite Inspection's operation, since 1988, as an adjunct of the Treasury IG, in important respects.

In short, contrary to the Solicitor General's key contention, the Inspection Service operated as a "representative of the agency" for *Weingarten* rights purposes, even though it was not the agency entity responsible for engaging in collective bargaining with the union.

2. The fundamental error of the Solicitor General's proposed *per se* rule is further underscored when assessed in connection with the transfer of functions effected by the IRS Reform Act. Under the Solicitor General's analysis, the *Weingarten* rights of IRS bargaining unit employees vanished upon the IRS Reform Act's conveyance of Inspection's functions and personnel to the newly created TIGTA—even though Congress never adverted to such a momentous consequence in the Act.

An inference that the IRS Reform Act has the effect of exterminating such fundamental employee rights as those

conferred by 5 U.S.C. 7114(a)(2)(B) cannot be squared with this Court's disfavored treatment of implied repeals of rights conferred by "express statutory text." *United States v. Fausto*, 484 U.S. 439, 453 (1987). Moreover, it strains credulity to assert that an OIG never functions as a "representative of the agency" where, as with the IRS, the new TIGTA will be interviewing employees with transplanted IRS Inspection Service investigators; will often be doing so at the behest of the IRS; and will be turning over that information to agency managers to be used in potential disciplinary actions against those employees.

ARGUMENT

For all the reasons stated by the respondents, the Eleventh Circuit correctly held that National Aeronautics and Space Administration Office of Inspector General (NASA-OIG) is a "representative of the agency" within the meaning of 5 U.S.C. 7114(a)(2)(B). As the court understood, NASA-OIG acts as a representative of NASA Headquarters where it is a NASA subcomponent; conducts investigations on behalf of its parent agency; and then provides investigatory information to NASA and other of its subcomponents for use in employee disciplinary proceedings. *Federal Lab. Rel. Auth. v. National Aeronautics & Space Admin.*, 120 F.3d 1208, 1213 (11th Cir. 1997) (*FLRA v. NASA*).

In challenging the decision of the court of appeals, the Solicitor General urges this Court to adopt a *per se* rule that an OIG can never be a "representative of the agency" within the meaning of the FSLMRS. Specifically, the federal government maintains that the NASA-OIG cannot be considered a "representative of the agency" because that phrase encompasses only an "agency component that engages in collective bargaining with the union at issue," a role not played by the NASA-OIG. (NASA pet. for cert. at 12; *see also* NASA Br. at 18 ("the management entity that has a collective bargaining relationship with a union")).

This key premise—that engaging in collective bargaining is a predicate for being a "representative of the agency"—is demonstrably erroneous. As we show, the error of the Solicitor General's operating principle is made especially manifest when it is applied in the context of the Internal Revenue Service.

1. As described *supra*, prior to its elimination (effective January 18, 1999), the IRS Inspection Service performed a function essentially the same as that of an Inspector General. Like Inspectors General, IRS Inspection's purpose was to prevent waste, fraud and abuse in IRS' operations and programs. In pursuit of that goal, Inspection, among other things, carried out law enforcement investigations involving criminal as well as administrative misconduct.

Though not possessing the same degree of autonomy from its agency as an Inspector General, the Inspection Service reported directly to the Commissioner and Deputy Commissioner and was designed, as President Truman stated, to be "completely independent of the rest of the [IRS]." Conf. Rep. at 77-78; *see Guide* at 71. In carrying out its responsibilities, Inspection did not "engage in collective bargaining" with NTEU.[5]

a. Even though Inspection was not the agency entity charged with "engag[ing] in collective bargaining" with NTEU (NASA pet. for cert. at 12), and contrary to the position now advanced by the Solicitor General, the federal government has never contested that Inspection Service investigators have been "representatives of the agency" within the meaning of the FSLMRS.

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[5] From time to time NTEU has met with officials of the Inspection Service in order to air issues of concern to the union; similar consultations have occurred with the acting TIGTA. It was not, however, the function of the Inspection Service to "engage in collective bargaining" with the union. Until the IRS' recent reorganization, that function was performed through its Assistant Commissioner (Support Services). *See* IRM 1142.1, 1142.23.

More important, the cases involving bargaining unit employees' entitlement to union representation in the context of Inspection interviews uniformly recognize that Inspection's investigators functioned as representatives of the agency. Those cases have instead focused on whether 5 U.S.C. 7114(a)(2)(B)'s other elements had been satisfied, thus triggering an employee's right to representation. In *IRS v. Federal Lab. Rel. Auth.*, 671 F.2d 560 (D.C. Cir. 1982), for example, the court enforced the FLRA's ruling that the IRS had committed an unfair labor practice in refusing to allow an employee to have union representation at an interview conducted by Inspection Service investigators. The court found substantial evidence supported the Authority's finding that the employee interviewed could have reasonably feared discipline. *Id.* at 563-64. *Accord IRS and National Treas. Employees Union*, 15 F.L.R.A 626, 647-48 (1984) (right to union representation found where IRS employee was acting as investigator for Inspection); *Department of the Treas., IRS and National Treas. Employees Union*, 15 F.L.R.A. 360, 361 (1984) (finding no entitlement to union representation where Inspection investigators did not "examine" the employee in question.)

Moreover, the federal government has never challenged the status of Inspection as a "representative of the agency" within the meaning of the FSLMRS even though, since 1988, the Inspection Service has functioned, in essential respects, as an adjunct of the Treasury IG. As noted, all audits and investigations of the Inspection Service have been overseen by the Treasury IG (5 U.S.C. app. 3, § 8D (a)(1)); Inspection has also been required to promptly report all of its significant activities to the IG (5 U.S.C. app. 3, § 8D(b)). Further, the IRS Commissioner has had to clear his selections of the Chief Inspector and other top Inspection officials with the Treasury IG. *See supra* at 5.

b. The recognition of bargaining unit employees' right to union representation in the context of Inspection examinations could hardly have been avoided. There is clear evidence, reflected in the FSLMRS' legislative history, that Congress' decision to codify this Court's *Weingarten* decision in the FSLMRS was, in significant part, specifically animated by the plight of rank and file employees who were subject to interrogations by the Inspection Service.

The Statute's official history contains a predecessor version of section 7114(a)(2)(B) that was sponsored by Representative Clay, a key author of the bill that became the FSLMRS.[6] *See* H.R. 3793, 95th Cong. (1978), *reprinted in Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, 229, 230 (Comm. Print 1979) (*Leg. Hist.*). During hearings conducted by the Subcommittee on Civil Service on that predecessor measure, employee representative witnesses described, in graphic terms, the need for union representation of employees in the context of Inspection examinations. *See* H.R. Rep. No. 95-920 (1978), *reprinted in Leg. Hist.* at 645. That testimony was later specifically endorsed by the Subcommittee in its report accompanying H.R. 3793.[7] *Id.*

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[6] *See Nuclear Reg. Comm'n v. Federal Lab. Rel. Auth.*, 859 F.2d 302, 309-10 (4th Cir. 1988) (describing key legislative role of Representative Clay).

[7] As was explained, "when an employee is summoned to appear before the IRS Inspection Service . . . it is done without warning and seldom is the employee advised of the nature of the interview . . . . Upon arriving . . . the employee is immediately sworn in and must answer all questions . . . . With no one to advise them of their rights, few employees have the experience or presence of mind to deal with professionally trained criminal investigators who are supposed to be experts in the art of interrogation. Nervous and unaccustomed to such surroundings, employees are oftentimes questioned about matters which occurred years before. They may be subject to badgering or harassment, becoming so confused and flustered that they agree with answers suggested by the inspectors even though their responses do not truly reflect what transpired." *Leg. Hist.* at 645.

In sum, the example of the IRS Inspection Service exposes the fallacy of the Solicitor General's fundamental premise: that the phrase "representative of the agency" encompasses only "the management entity that has a collective relationship with a union." (NASA Br. at 18.) There is no basis for concluding that it was Congress' intent to deny union representation solely because the agency's investigative unit happens to be employed in a subcomponent that does not have a bargaining relationship with employees and their union. *See Defense Crim. Investigative Serv. v. Federal Lab. Rel. Auth.*, 855 F.2d 93, 99 (3rd Cir. 1988) (*DCIS v. FLRA*) (rejecting the government's argument to that effect).

2. Given the government's categorical position that OIG investigators can never function as "representatives of the agency," the Solicitor General would presumably maintain that, in the wake of the IRS Reform Act's conveyance of the Inspection Service's functions and investigators to the newly created TIGTA, the *Weingarten* rights of IRS bargaining unit employees have now evaporated —even though Congress said not a word about it. The notion that the Reform Act effected such an implied repeal of the fundamental employee representation rights conferred by the FSLMRS is untenable. Such a view underscores the lack of merit in the Solicitor General's sweeping position that OIG investigators are, by definition, not "representatives of" their agency within the meaning of the FSLMRS.

a. First, a contention that the IRS Reform Act impliedly repealed the *Weingarten* rights of IRS employees cannot be squared with this Court's precedent. In *United States v. Fausto*, 484 U.S. 439 (1987), the Court stressed that an implied repeal of a right conferred by "express statutory text" must be strongly disfavored because it is "strongly presumed that Congress will specifically address language in the statute books that it wishes to change."

Id. at 453. *See also County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 262 (1992) (citing "cardinal rule" that repeal by implication is strongly disfavored); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189 (1978) (relying on the "cardinal rule" in holding that a provision of the Endangered Species Act was not repealed by implication).

Fausto's application here is clear. By enactment of the FSLMRS in 1978, Congress gave union-represented federal employees an express right in the "statute books" (*Fausto*, 484 U.S. at 453) to union representation when they are examined under the circumstances delineated by section 7114(a)(2)(B). Encompassed by this right were examinations of bargaining unit employees by the IRS Inspection Service. Nothing in the IRS Reform Act purports to "specifically address" (*Fausto*, 484 U.S. at 453), much less repeal, employees' statutorily conferred *Weingarten* rights.

b. Examination of the purposes of the IRS Reform Act further confirms that Congress did not intend to extinguish the *Weingarten* rights of rank and file bargaining unit employees. The Act's history reveals Congress conducted a comprehensive inquiry into the operations of the IRS with special focus on the Inspection Service. In the course of doing so, Congress discovered a variety of flaws with respect to Inspection's operations. There was no evidence, however, that affording employees *Weingarten* protections during Inspection examinations was one of those flaws. Notwithstanding the magnifying glass placed on Inspection's operations, no one suggested, even remotely, that Inspection's recognition of *Weingarten* rights during its examinations had ever conflicted in any way with the functions of that office. Instead, the record is clear that Congress' primary goal in transferring functions from Inspection to the TIGTA was to ensure greater accountability of IRS' managers.[8] *See, e.g., Oversight Hearing*, at 44, 113.

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[8] The purpose of the Reform Act's creation of the TIGTA dovetails with the central goal of the Inspector General Act: to give

When viewed against the backdrop of the IRS Reform Act, the Solicitor General's urging of a *per se* rule that exempts all OIGs from section 7114(a)(2)(B) is wholly unpersuasive. As described, under the IRS Reform Act's transfer of functions from the Inspection Service to the new TIGTA, virtually all of the same investigatory personnel will continue to conduct examinations of rank and file employees. Those investigations will be carried out in the name of the Treasury Department, with the new Treasury OIG acting as the "strong right arm" of the agency head. *United States Nuclear Reg. Comm'n v. Federal Lab. Rel. Auth.*, 25 F.3d 229, 235 (4th Cir. 1994) (quoting S. Rep. No. 95-1071, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2676, 2684). Indeed, in fashioning the IRS Reform Act, Congress has made clear that the TIGTA is expected to be "responsive" to requests of the IRS Commissioner for investigations—including those of employees. *See supra* at 8. And, of course, it is undisputed that the former Inspection investigators, newly ensconced within TIGTA, will continue to make the information they collect available to Treasury and its IRS subcomponent for purposes of initiation of disciplinary actions against rank and file employees.

In sum, given these circumstances, it is difficult to fathom how TIGTA investigators would not be functioning as their agency's surrogates when they conduct employee examinations. The federal government's insistence on a blanket rule that OIG investigators can never be considered "representatives" of their agency defies a common

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IGs sufficient autonomy so that they would be able to vigorously investigate those agency managers who might be inclined to cover up their own ineffectiveness. *See DCIS v. FLRA*, 855 F.2d at 98. As the Eleventh Circuit pointed out, there is no indication that Congress believed that "the presence of a union representative at OIG interviews, as mandated by federal statute" was "interference" from which OIG investigators needed to be shielded. *FLRA v. NASA*, 120 F.3d at 1214. The IRS Reform Act and its history confirm the correctness of this view.

sense interpretation of that term. Nor, when applied in the context of the IRS, could such a *per se* approach be squared with Congress' intent in fashioning the IRS Reform Act.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

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No. 98-369

In the Supreme Court of the United States

OCTOBER TERM, 1998

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, WASHINGTON, D.C., AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION OFFICE OF THE INSPECTOR GENERAL, PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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This case turns on whether an investigator of the NASA-OIG is a "representative of the agency" within the meaning of the Federal Service Labor-Management Relations Statute (FSLMRS), 5 U.S.C. 7114(a)(2)(B).[1] As we demonstrate in our opening brief, a "representative of the agency" in Section 7114(a)(2)(B) must be a representative of agency *management*, and the Inspector General cannot be such a representative because of the independence conferred on him by the

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[1] All parties agree that the relevant "agency" in this case is NASA. Contrary to the suggestion of AFGE (Br. 24-25), petitioners do not contend otherwise.

Inspector General Act, 5 U.S.C. App. 3. Respondents' contrary arguments fail to appreciate the fundamental independence of an Inspector General from agency management.[2]

1. The FLRA appears to agree that a "representative of the agency" must be a representative of agency management, as opposed to just another employee.[3] See Pet. App. 40a-41a (term does not exclude "management personnel employed in other subcomponents of the agency"); FLRA Br. 16, 21-28. Indeed, that proposition follows from the text and structure of the FSLMRS: the statute itself governs labor-management relations in the federal sector, and the section at issue here (7114) is captioned the "[r]epresentation rights and duties" of labor and management.[4] Neither respondent contests that, in all three places in the FSLMRS in which the words "representative of the

[2] As we explain in our opening brief (at 39-40), the FLRA's determination is not entitled to deference, because it erroneously construed the FSLMRS and—more important—because it failed to consider adequately the implications of the Inspector General Act for the question whether the Inspector General can be a "representative of the agency."

[3] Neither respondent appears to contend that the procedures of Section 7114(a)(2) govern one co-worker's attempt to question another about some matter the resolution of which could ultimately result in disciplinary action. A co-worker acting on his own initiative is not a "representative of the agency" within the meaning of the statute, because a co-worker does not represent agency management.

[4] Contrary to the suggestion of AFGE (Br. 28), we do not contend that, in order to be a representative of the agency in a Section 7114(a)(2)(B) examination, a questioner must also be the agency's collective bargaining representative. But the questioner must *represent* agency management, which an OIG agent does not do.

agency" appear, the statute addresses the relationship between management and those employees who are given rights under the FSLMRS arising out of the collective bargaining relationship between labor and management. See 5 U.S.C. 7103(a)(12), 7114(a)(2)(A) and (B); see also Pet. Br. 18-19.

2. Respondents' fundamental error is to assert that an Inspector General is part of, or represents, agency management for purposes of applying Section 7114(a)(2)(B). The express purpose of the Inspector General Act was to create investigative units "independent" of agency management. See 5 U.S.C. App. 3 § 2. Although the FLRA is correct that the Inspector General Act does not provide "absolute autonomy" from agency management (Br. 33), numerous provisions of the Inspector General Act demonstrate that Congress intended an Inspector General to have sufficient independence to prevent an OIG agent from being a "representative of the agency" for purposes of Section 7114(a)(2)(B). For example, no agency manager can exercise authority over OIG functions. 5 U.S.C. App. 3 § 3(a). The head of the agency can neither compel an OIG to undertake a particular investigation nor direct how it will be conducted. See 5 U.S.C. App. 3 § 3(a); Pet. Br. 26. And the Inspector General has autonomy to "make such investigations * * * as are, in the judgment of the Inspector General, necessary or desirable." 5 U.S.C. App. 3 § 6(a)(2).

Contrary to AFGE's contentions (Br. 14, 30-31), the fact that an OIG is under the "general supervision" of the agency head, 5 U.S.C. App. 3 § 3(a), does not give that officer any power to regulate the OIG's activities, compel the OIG to engage in collective bargaining with agency employees, or require the OIG to comply with investigative procedures collectively bargained by

agency management with its unions. See *NRC* v. *FLRA*, 25 F.3d 229, 235 (4th Cir. 1994) ("general supervision" provided by the statute is only "nominal"). Indeed, Congress placed OIGs under the "general supervision" of the agency head only to overcome concerns that the Inspector General's work might be "significantly impaired if he does not have a smooth working relationship with the department head." S. Rep. No. 1071, 95th Cong., 2d Sess. 9 (1978). Moreover, because the Inspector General derives authority to investigate from the Inspector General Act and not from the agency head, an Inspector General conducts investigations only because he has chosen to do so and not because of any authority delegated by the agency head. See Pet. Br. 26; 5 U.S.C. App. 3 §§ 2(1), 4(a).[5]

Respondents correctly note that agency management has wide discretion to designate a person as a "representative of the agency," whether for purposes of collective bargaining or for the discussions and examinations that are the subject of Section 7114(a)(2). FLRA Br. 27; AFGE Br. 14. Contrary to the FLRA's suggestion (Br. 27-28), petitioners do not dispute that anyone designated by agency management to conduct investigatory interviews of federal employees would be

[5] The FLRA mistakenly suggests that an Inspector General is part of agency "management" for purposes of applying Section 7114(a)(2)(B) because the Inspector General provides policy recommendations to agency management (Br. 32 n.15). To the contrary, while the Inspector General Act imposes a duty to make policy recommendations, which the agency head is not obliged to accept, see 5 U.S.C. App. 3 § 4(a)(1)-(3), the Act bars the OIG from participating in the actual "performance" of agency management functions. 5 U.S.C. App. 3 § 9(a) ("there shall not be transferred to an Inspector General under paragraph (2) program operating responsibilities").

a "representative" of management for that purpose. But agency management cannot designate the Inspector General for that function, because the Inspector General Act gives the Inspector General the independence to decide when and how to conduct investigations, free of influence from agency managers. See 5 U.S.C. App. 3 §§ 3(a), 6(a).[6]

Respondents erroneously contend that an Inspector General is not in fact independent of agency management because the Inspector General must rely on the power of agency management to compel an employee to attend an investigatory interview. FLRA Br. 38; AFGE Br. 4, 15-17, 36-37. Although the Inspector General relies on the assistance of management to command the presence of witnesses at interviews—or to request documents from another agency, 5 U.S.C. App. 3 § 6(b)(1)[7]—the Inspector General nonetheless functions completely free of management in deciding "when and how" to investigate. *DOJ*, 39 F.3d at 367 (quoting *NRC*, 25 F.3d at 234).[8] Indeed, the FBI, DEA, and all

[6] Nor could the agency head designate the Inspector General as its representative for collective bargaining, because the Inspector General Act expressly precludes the Inspector General from engaging in policy or programmatic functions of which collective bargaining is a core type. See 5 U.S.C. App. 3 § 9(a).

[7] The AFGE reads that provision as pertaining to an OIG's request for documents from the agency within which it is established (Br. 37), but that reading is mistaken. See 5 U.S.C. App. 3 § 6(a)(1).

[8] AFGE contends that the OIG investigator here acted for NASA-HQ by threatening P with discipline if he did not cooperate. Br. 15 (citing Pet. App. 19a). The OIG has no authority to discipline an agency's employees. It can merely report an employee's noncooperation to agency management, for such action as management chooses to take.

other law enforcement agencies also rely on management to compel an employee to appear at an interview, but that fact does not transform those entities into "representatives" of agency management.[9]

Nor does an Inspector General become a "representative of the agency" simply because an OIG investigation provides a benefit to the agency. See FLRA Br. 47; AFGE Br. 31-32. Congress intended the Inspector General to serve the agency's interests by establishing an independent watchdog within the agency that would provide candid management advice, conduct audits of agency programs, and investigate wrongdoing by agency employees and third parties that did business with agencies. The fact that an OIG may provide investigative information to agency management (FLRA Br. 22; AFGE Br. 14-15) does not make an Inspector General a "representative of the agency" for purposes of the statutory *Weingarten* rule, just as the FBI, DEA, and local police departments do not become representatives of the agency when they provide investigative information to agency management about the wrongdoing of a federal unionized employee. See Pet. Br. 42-43. Thus, the fact that the agency benefits from the OIG's investigation does not transform an OIG investigation into one "authorized [by] the establishment." AFGE Br. 32.[10]

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[9] The FLRA is also mistaken in its suggestion that the independence of an Inspector General is undercut by limitations imposed by the Privacy Act and the appropriations process (Br. 33-34). Those limitations apply to all Executive Branch entities, and do not provide a basis for distinguishing between independent and dependent entities.

[10] Respondents argue that an OIG investigator is a representative of an agency under 5 U.S.C. 555(b), which provides a right to counsel for a "person compelled to appear in person before an agency or representative thereof," and therefore the OIG investigator must also be a representative of the agency under 5 U.S.C. 7114(a)(2)(B) (FLRA Br. 36-37; AFGE Br. 17 n.4). They are mistaken on both counts.

First, it is doubtful that Section 555(b) applies to OIG investigative interviews. Section 555(b) is part of the Administrative Procedure Act (APA), which concerns rulemakings, adjudications, and other agency proceedings, and not law enforcement investigations like those conducted by the OIG. In any event, Section 555(b) applies only when a person is "compelled to appear," which is not the case in most OIG interviews, including this one (see Pet. App. 61a).

Second, even if Section 555(b) does apply to OIG interviews and the OIG investigator is a "representative" of "an agency" for that purpose, it does not follow that an OIG investigator is also a "representative of the agency" within the meaning of Section 7114(a)(2)(B). The APA and the FSLMRS define "agency" differently. Compare 5 U.S.C. 551(1) ("each authority of the Government of the United States, whether or not it is within or subject to review by another agency") with 5 U.S.C. 7103(a)(3) (1994 & Supp. II 1996) ("Executive agency"). Thus, the OIG itself may be an agency under the APA, and not under the FSLMRS (see AFGE Br. 25 & n.8; FLRA Br. 20). And an OIG investigator who interviews an employee may thus be a "representative" of "an agency" (the OIG) for purposes of the APA, but not a "representative" of the employee's agency (in this case NASA) for purposes of 5 U.S.C. 7114(a)(2)(B).

Finally, the fact that information obtained in an OIG investigation may be used by agency management in a disciplinary inquiry does not make the OIG investigator a representative of management. Upon receipt of an OIG investigative report, agency management may take no action, conduct further factual investigation, or initiate disciplinary proceedings. Any interviews conducted by agency management representatives would be subject to Section 7114(a)(2)(B). And in the disciplinary process itself, an employee has a broad range of procedural and representational rights that are

unaffected by resolution of the issue in this case. See 5 U.S.C. 7501 *et seq.*; 5 C.F.R. Pt. 752. Those possibilities, however, do not transform an OIG investigation into an act of a management representative.

3. Respondents and amicus NTEU seem to argue that Section 7114(a)(2)(B) is designed to protect an employee from *any* action that may lead to discipline (FLRA Br. 29; AFGE Br. 17-18; NTEU Br. 10), but in fact there is no basis for such a broad claim. Like the *Weingarten* right on which it is modeled, Section 7114(a)(2)(B) regulates the relationship between labor and management in the context of a collective bargaining relationship. It does not give employees rights in interviews by police officers or co-workers, notwithstanding the potential for discipline in such cases, but only gives them rights in interviews by representatives of management.

The statutory *Weingarten* right in Section 7114(a)(2)(B) is part of the cluster of rights and duties that flows out of the collective bargaining relationship between agency management and employees covered by the FSLMRS.[11] The courts of appeals have uniformly concluded that the rights and duties of Section 7114 are limited to the persons and entities who have

[11] The representational rights in Section 7114(a)(2)(B) are not absolute: the employee must request them and the interviewer is not obligated to advise the employee of their existence; if an "exclusive representative" has not been designated, the interviewer is not required to permit a union representative to participate in the interview; and federal workers that fall outside the definition of "employee" (5 U.S.C. 7103(a)(2)) or are excluded from the bargaining unit (5 U.S.C. 7112(b)) are not entitled to invoke them.

such a collective bargaining relationship.[12] In *United States Department of Veterans Affairs* v. *Federal Labor Relations Authority*, 1 F.3d 19 (D.C. Cir. 1993) (R. Ginsburg, J.), for example, the court held that the FLRA could not compel an agency to comply with disclosure obligations under 5 U.S.C. 7114(b), in the absence of a collective bargaining relationship between labor and management. As the court summarized its holding: the "requirement of collective bargaining is critical to the information right described in 5 U.S.C. § 7114(b)(4)(B). Because the VA medical personnel involved in this case had no information-rights-generating collective bargaining agreement with the agency, and no statutory right to engage in collective bargaining, the FLRA's [disclosure] order is unauthorized by the FSLMRS." 1 F.3d at 23 (footnotes omitted).

[12] Every right in Section 7114 flows out of the collective bargaining relationship. Section 7114(a)(1) specifies what the "labor organization which has been accorded exclusive recognition [and] is the exclusive representative of the employees in the unit" is entitled to do; Section 7114(a)(2) specifies when the "exclusive representative" may be "represented" at discussions or examinations conducted by "representatives of the agency"; Section 7114(a)(3) requires the agency annually to inform "employees" (as defined in Section 7103(a)(2)) of their representation rights; Section 7114(a)(4) requires an agency and the exclusive representative to "meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement"; and Section 7114(a)(5) provides that the "rights of an exclusive representative" shall not preclude an employee from other rights of representation. Section 7114(b) provides the requirements of "good faith" that the "exclusive representative" and agency must exhibit in their negotiations. Section 7114(c) provides for the "head of the agency" to approve an "agreement" between the "agency and an exclusive representative."

The same limitation of Section 7114 rights to the collective bargaining relationship has been sustained to permit unions to avoid representing non-member employees of the bargaining unit in certain contexts. See *American Fed'n of Gov't Employees* v. *FLRA*, 812 F.2d 1326, 1328 (10th Cir. 1987) (union's duty of fair representation of all employees within bargaining unit [5 U.S.C. 7114(a)(1)] is coterminous with union's power as exclusive representative and does not require union to represent nonmember employee who was entitled to choose representative other than union on appeal of his case); *National Treasury Employees Union* v. *FLRA*, 800 F.2d 1165, 1169-1170 (D.C. Cir. 1986) (obligation of fair representation imposed on union depends on existence of collective bargaining relationship). Since the representation rights and duties of Section 7114(a)(2), like those of Section 7114(a)(1), also depend on the existence of a collective bargaining relationship, the text and intent of the FSLMRS do not support the FLRA's holding that an Inspector General must afford union representational rights in interviews by OIG investigators, who do not represent management. See Pet. Br. 43.

4. Respondents suggest that because Postal Inspectors were treated as representatives of the United States Postal Service by several NLRB decisions and a D.C. Circuit opinion, therefore so too an Inspector General should be viewed as a representative of agency management. See FLRA Br. 28-30 (citing *Eddie L. Jenkins*, 241 N.L.R.B. 141 (1979); *Ralph Bell*, 288 N.L.R.B. 864 (1988); and *United States Postal Serv.* v. *NLRB*, 969 F.2d 1064 (D.C. Cir. 1992) (R. Ginsburg, J.) (*USPS*)); see also AFGE Br. 19-23. That analysis is mistaken.

The issue in *USPS* was whether the *Weingarten* right "cover[ed] pre-interview consultation between employee and union representative." 969 F.2d at 1066. The NLRB held that it did, and in upholding that construction, the court had no reason to question the applicability of *Weingarten* rights to interviews by postal inspectors—those rights had long been recognized by the Postal Service and they were expressly recognized in the collective bargaining agreement. *Ibid.*[13]

The analogy respondents seek to draw from the case is inapposite, because the postal inspectors in *USPS* were not OIG personnel and lacked the statutory independence that Congress has conferred on the OIGs. The postal inspectors were Postal Service employees and agents, *USPS*, 969 F.2d at 1066, and although not "under the supervision or direction of postal supervisors or managers" (AFGE Br. 22 (quoting *Ralph Bell*, 288 N.L.R.B. at 865)), they reported to and were under the supervision of the Postmaster General (*ibid.*). In that respect they were just like the management-directed internal affairs investigators whose lack of independence led Congress in 1978 to enact the Inspector General Act (see Pet. Br. 4).[14]

Thus, the decision about postal inspector interviews in *USPS* had no necessary implications for OIG interviews, as the court implicitly recognized when it ultimately held that OIG interviews are not subject to

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[13] The Postal Service is regulated under the National Labor Relations Act, not the FSLMRS. See 39 U.S.C. 1209.

[14] By contrast, OIGs are created separately and independently from the agency and Inspectors General have authority to hire and fire their own staffs. See generally Pet. Br. 25 & n.12, 25-33; 5 U.S.C. App. 3 § 6(a)(7).

Section 7114(a)(2)(B). See *DOJ*, 39 F.3d at 361.[15] Indeed, four years after the D.C. Circuit's decision in *USPS*, Congress created an Office of the Inspector General for the Postal Service and thereby explicitly differentiated the independence of investigators who report to the Inspector General from that of investigators in the Inspection Service who report to the Postmaster General. See 5 U.S.C. App. 3 § 8G(f)(1) (Supp. II 1996).

The FLRA appears to argue that postal inspectors are so similar to OIG investigators that similar treatment is required under the FSLMRS (Br. 42 n.20), but that argument overlooks the critical distinction between an independent investigative entity and an internal security unit controlled by management. Many agencies had their own internal security personnel before the establishment of OIGs, but the Inspector General Act created an independent entity within the agency with a different status for its investigative agents. See 5 U.S.C. App. 3 § 9 (transferring functions of various internal security offices to the Office of Inspector General established within the named agencies).[16]

[15] Judge Randolph, who had joined the court's opinion in *USPS*, was the author of the *DOJ* decision, thus suggesting that he discerned no conflict between applying *Weingarten* rights to interviews conducted by management-supervised investigative agents and disallowing such rights in interviews conducted by OIG agents.

[16] Neither respondent contests the observation in our opening brief (at 21-22 & n.9) that private-sector *Weingarten* rights do not recognize a right to union representation when an employee is interviewed by a law enforcement agency, such as the FBI. Just as an FBI investigation in the private sector context is not controlled by management, so too here an OIG investigation is not controlled by an agency's management.

Contrary to the suggestion of amicus NTEU (Br. 14-15), there is nothing implausible about the fact that in 1978 Congress extended *Weingarten* rights to federal employees in interviews conducted on behalf of agency management, and at the same time established independent investigative units whose activities are not directed by management and not subject to *Weingarten* rights.[17] Agencies that have OIGs do not cease to conduct internal investigations directed by management; indeed, they maintain internal affairs units precisely so that agency managers can address employee misconduct that the Inspector General (because of resource constraints or investigative priorities) chooses not to investigate.[18] A unionized employee may request union

[17] Contrary to NTEU's assertion (Br. 14), creation of an Inspector General in an agency did not and does not "repeal" any rights under Section 7114(a)(2)(B). Those rights apply in any management-directed interview when requested by an employee who reasonably fears disciplinary action. Rather, by creating independent OIG investigative units, Congress provided that, when an Inspector General conducts the interview, Section 7114(a)(2)(B) does not apply, since the Inspector General is not part of "management" for that purpose. Congress could have achieved the same result by transferring management-directed internal affairs units to the FBI, but it chose instead to create independent Offices of Inspector General that would conduct investigations and audits of agency programs. (Notably, the FLRA has not adopted the NTEU's argument.)

[18] See, *e.g.*, 8 C.F.R. 103.1(e) (Immigration and Naturalization Service creation of Office of Internal Audit "to conduct or direct the conduct of investigations of alleged misconduct by Service employees, subject to agreements" with the Department's Office of Inspector General); 60 Fed. Reg. 22,100, 22,130, 22,133 (1995) (contrasting duties of Office of Labor Management Relations and Office of Program and Integrity Reviews with Office of Inspector

representation pursuant to Section 7114(a)(2)(B) when an internal affairs unit conducts the investigative interview. When an OIG agent conducts the interview, however, concerns that management will use the investigative process to interfere with rights collectively bargained by the union are not present, so the employee is not entitled to request union representation.[19]

5. Respondents understate the extent to which the rule announced below conflicts with specific provisions of the Inspector General Act that ensure the Inspector General's independence.

a. Attendance of a union representative at an OIG interview interferes with the confidential reporting and

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General in Social Security Administration); *id.* at 4417 (describing Food and Drug Administration Office of Internal Affairs and investigative liaison function with Department of Health and Human Services OIG).

[19] Thus, while the AFGE cites references in the legislative history of the FSLMRS to the *Weingarten* rule in interviews by an agency's internal security force (Br. 19-23), those references provide no support for the application of the rule to investigators of a new and independent Office of Inspector General. NTEU's reliance (Br. 13) on a predecessor version of Section 7114(a)(2)(B), sponsored by Representative Clay, is also misplaced. See also AFGE Br. 20-22. That version preceded the Udall compromise that became the bill that was enacted into law. See Pet. Br. 23-24 n.10. Accordingly, the predecessor version and the discussion surrounding it are of little value in understanding the intent behind the FSLMRS, as enacted. Representative Clay was a reluctant supporter of the Udall Amendment, see 124 Cong. Rec. H9637 (daily ed. Sept. 13, 1978), reprinted in *Legislative History*, *supra*, at 930-931, and this Court has emphasized that the views of legislators who seek a more restrictive wording should not control the interpretation of a statute that was the result of a compromise like the FSLMRS. *Hardin* v. *Kentucky Util. Co.*, 390 U.S. 1, 11 (1968). Notably, the FLRA has not relied on the predecessor version or the legislative history cited by the AFGE and NTEU.

nondisclosure obligations imposed by the Inspector General Act. See Pet. Br. 33-34. Respondents suggest that there is no general duty of confidentiality (FLRA Br. 34, 36; AFGE Br. 34), and that in any event, necessary confidentiality can be protected by negotiation in the collective bargaining process of appropriate confidentiality provisions (FLRA Br. 37; AFGE Br. 35). Both arguments are mistaken.

The duty of confidentiality is found in several provisions of the Inspector General Act. First, the OIG must report directly to the Attorney General (and not to the agency head) if the OIG finds reasonable grounds to believe there has been a violation of federal criminal law. 5 U.S.C. App. 3 § 4(d). The rationale behind that provision is to maintain confidentiality within the agency and to ensure prompt handling of the matter without political interference from agency managers. See S. Rep. No. 1071, *supra*, at 30. Second, the Inspector General Act expressly requires the Inspector General to maintain the confidentiality of information in a criminal investigation, see 5 U.S.C. App. 3 § 5(e)(1), and to avoid disclosing the identity of the employee who provided information to the Inspector General regarding possible violations of law, see 5 U.S.C. App. 3 § 7(b).[20]

The FLRA misses the point when it asserts (Br. 36) that a union representative might, by clarifying the facts, assist the OIG in preparing a more accurate report, since providing assistance by attending the interview is inconsistent with the duty of confidentiality. Nor can the obligation of confidentiality be safeguarded through provisions negotiated in collective bargaining,

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[20] Citation to those provisions was inadvertently omitted from our opening brief. See AFGE Br. 33-34.

as respondents suggest. See FLRA Br. 37; AFGE Br. 35. Because an OIG is excluded from collective bargaining, it would be dependent on agency management to negotiate any such provision. Such dependency is entirely inconsistent with the statutory independence of the OIG, as the Fourth Circuit recognized in *NRC*, 25 F.3d at 229 (holding that agency head was not required to bargain over proposals pertaining to procedures for OIG investigations).

b. During the past decade, when the courts of appeals have disagreed over whether Section 7114(a)(2)(B) is applicable to OIG investigations, the FLRA has encouraged an expansive construction of that provision, resulting in uncertainty for OIG agents and interference with OIG control over investigations. In *DOJ*, 39 F.3d at 367, for example, the union representative sought the right to halt the interview in order to discuss answers to questions outside the hearing of the investigator. That "right" unquestionably interferes with the OIG's conduct of an investigation—by subjecting the investigator to external rules of procedure and by depriving the OIG of the frank and unrehearsed answers of the employee. The FLRA responds that it has recently decided that there is no per se right for the union representative and the employee to halt the investigation in order to step outside the room and consult regarding the answers to certain questions. Br. 40. The FLRA's response, however, highlights two points: the FLRA recognizes *some* right to halt an OIG interview, and OIGs will only know whether they have deprived a union representative of that "right" after they have been found guilty of an unfair labor practice.

The FLRA argues that the right to consult during or in advance of an interview is not disruptive and

"advances the purposes of *Weingarten*" (Br. 40), but that argument misses the point. The right to consult is necessarily disruptive in the sense that any external procedure imposed on the Inspector General interferes with his ability to decide how best to conduct an investigation. And while consultation might advance the *Weingarten* purpose of alleviating tensions and misunderstandings between labor and management when agency managers investigate employee misconduct, that objective has little relevance to an OIG investigation because an Inspector General is not an employer-manager of the interviewee.

c. The FLRA concedes that if this Court accepts its construction, the scope of *Weingarten* rights will be subject to wider and wider expansion in collective bargaining negotiations. Br. 43 (petitioners' "point [at Pet. Br. 37-38] is correct"). Accordingly, the full extent of the rule's impact on the OIG's investigative independence is not now knowable.[21] Because the FSLMRS gives unions the power to negotiate to impasse in order to have their proposals imposed on the agency, see 5 U.S.C. 7119(b) and (c), an OIG's freedom to investigate wrongdoing by unionized employees could be sharply curtailed.

It is no answer that the agency can negotiate in this area, or ultimately seek judicial review of any adverse resolution of a dispute by the FLRA. See FLRA Br. 43. As noted above, it is fundamentally inconsistent with the independence of the Inspector General to make the OIG dependent on agency management to

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[21] The FLRA seemingly acknowledges (Br. 39) an uncertain scope to the rule, but notes that it is not boundless and that the FLRA "has recognized limits on a union representative's participation in section 7114(a)(2)(B) examinations."

negotiate about OIG investigative procedures. See p. 14, *supra*. Affording agency management that kind of leverage over an Inspector General is inconsistent with the text and purposes of the Inspector General Act.[22]

d. The requirement of union representation at investigative interviews creates special problems in criminal investigations conducted jointly by an OIG with other law enforcement agencies. Pet. Br. 36. Law enforcement agencies are likely to decline collaboration with an OIG if the latter's presence carries with it the obligation to comply with the *Weingarten* rule, as the FLRA has opined that it does. See, *e.g.*, *AFGE Local 3316*, 35 F.L.R.A. 790, 802 (1990) (*Weingarten* rule applies to FBI investigatory interview where OIG investigator was also present and participated in the interview because the information obtained from the employee "could, and in all probability would," be forwarded to the agency).

The FLRA acknowledges a potential problem in criminal investigations (Br. 43), notes that "virtually any workplace matter being investigated involves conduct that could be characterized as a crime" (Br. 44), and contends that the FLRA and the courts of appeals can solve the problem by determining on a case-by-case basis whether the *Weingarten* right should apply. (Br. 43). The result of such a regime, however, will be to leave OIG investigators without guidance, requiring them to guess when and whether the FLRA will

[22] Moreover, if investigative procedures were subject to collective bargaining, the result would be to create grave practical problems for OIG agents, who would be required to know the nuances of collective bargaining agreement provisions contained in dozens (and even hundreds) of agreements with the agency before they could conduct an interview in a manner that would not subject them to an unfair labor charge. See Pet. Br. 6.

impose an unfair labor charge if the Inspector General restricts the participation of a union representative. That uncertainty is intolerable where, as here, the OIG cannot be certain before the interview whether its investigation of the facts will culminate in a criminal prosecution or disciplinary proceedings.[23] The price of the FLRA's uncertainty is made even higher by the fact that it has created an exclusionary rule to enforce the statutory *Weingarten* provision—evidence of wrongdoing by an employee cannot be used for discipline if the evidence was obtained in violation of the rule. See *AFGE Local 1917*, No. BN-CA-50149, 1996 WL 560250, at *9 (FLRA July 30, 1996) (ALJ found DOJ-OIG to have violated *Weingarten* right and enjoined agency from using information gathered at interview to support any disciplinary action), rev'd *sub nom. FLRA* v. *United States Dep't of Justice*, 137 F.3d 683 (2d Cir. 1998), petition for cert. pending, No. 98-667.

6. In arguing that NASA-HQ is responsible for any unfair labor practice that may have been committed by NASA-OIG, the FLRA concedes (Br. 46) that "NASA-HQ may not prevent NASA-OIG from initiating, carrying out, or completing an audit or investigation" but argues that "the IG Act gives no indication that an

[23] Taking a sentence from the OIG's testimony before the ALJ, the FLRA (Br. 6 n.4) and the court of appeals (Pet. App. 23a-24a n.12) have drawn the erroneous conclusion that the OIG agent's belief prior to the interview that P had not committed a prosecutable crime was somehow dispositive in making the interview part of an administrative disciplinary investigation as opposed to a criminal probe. The agent's belief prior to the interview was necessarily subject to modification as a result of facts learned in the interview or otherwise. It would be unworkable to make the application of Section 7114(a)(2)(B) turn on the decision (made *after* an interview) whether to refer a matter for prosecution.

agency head is prohibited from directing the OIG to comply with a federal statute." Yet as this case demonstrates, there may be a substantial difference of opinion about the proper construction of the relevant statute. Because an agency head does not have the authority to tell an Inspector General how to conduct an audit or investigation, see 5 U.S.C. App. 3 § 3(a), agency headquarters should not be liable if an Inspector General adheres to an interpretation that is ultimately rejected by the courts. See Pet. Br. 47-48. Nor does the fact that an Inspector General's work ordinarily produces some benefit to the agency change that result (FLRA Br. 47), in light of the fact that an Inspector General conducts his own investigation, and not the agency's. See p. 3, *supra*; Pet. Br. 44-45.

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For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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